U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 24 February 2003

CASE NUMBER: 2002-LHC-1088

OWCP NO.: 06-172160

IN THE MATTER OF

STEVE GOODMAN,
Claimant

v.

CSI HYDROSTATIC TESTERS,
Employer

and

RELIANCE NATIONAL INDEMNITY CO.,
c/o LIGA,
Carrier

APPEARANCES:

Billy W. Hilleren, Esq.
On behalf of Claimant

Christopher Landry, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Steve Goodman (Claimant) against CSI Hydrostatic Testers (Employer), and Reliance National Indemnity Co., c/o LIGA. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of

Administrative Law Judges for a formal hearing. The hearing was held on November 14, 2002, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty-seven exhibits, which were admitted, including: various Department of Labor filings; Employer's report of accident; Social Security Administration earnings records; previous employment wage reports; Employer's wage records; medical records from USA Knollwod Park Hospital, Russo Clinic (William H. Johnson), Houma Orthopaedic (William H. Kinnard), and Carl T Hayden Veterans Administration Medical Center; medical records and deposition of Dr. Richard I. Zipnick; medical records of Dr. Steven Laitin; a Department of Veterans Affairs Disability Rating Decision; pharmacy records; Physician's Desk Reference insert for Percocet; Claimant's job contact log; a vocational report of Tom Stewart; discovery responses; and Claimant's request for mileage reimbursement.[1]

Employer introduced twenty-three exhibits, which were admitted, including: Employer's report of accident; Employer's claim file; Employer's payroll file; filings with the Department of Labor; Claimant's wage records from other employers; discovery responses; Claimant's recorded statement; Employer's accident/safety reports; vocational rehabilitation reports; medical records from USA Knollwood Hospital; medical records of Drs. Terry W. McLean, William Kinnard, W.H. Johnson, Steven Laitin, Richard I. Zipnick, Christopher Cenac, and Joseph Gimbal; correspondence from Claimant's attorney; and a CT consultation report dated July 7, 2000.

Following the formal hearing in this case, Employer moved for summary judgment on the grounds that Claimant was not a covered employee under the Act by virtue of his alleged status as a member of a vessel's crew. Employer's motion came before this Court in a conference call dated January 7, 2003, and the parties agreed to consolidate their arguments thereon in the post-hearing briefs. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of the accident/injury was December 15, 1996;

2. The injury occurred in the course and scope of employment;

---

[1] References to the transcript and exhibits are as follows: Trial Transcript- Tr.__; Claimant's Exhibits- CX __, p.__; Employer Exhibits- EX __, p.__; Administrative Law Judge Exhibits- ALJX __, p.___.

3. An employer-employee relationship existed at the time of the accident;

4. Employer was advised of the injury on December 15, 1996;

5. A Notice of Controversion was filed on April 16, 2001;

6. The date of the informal conference was May 31, 2001;

7. Employer paid temporary total disability wage benefits from January 27, 1997 to June 20, 2000, at $200.27 per week, totaling $35,648.06; and

8. Employer paid medical benefits.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction/coverage;

2. Average weekly wage;

3. Nature and extent of disability;

4. Loss of earning capacity;

5. Section 7 benefits; and

6. Penalties, interest, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Beginning in 1968, Claimant served a twenty-eight month tour of duty in Vietnam as a radio microwave repairman. (CX 18, p. 101; CX 23, p. 4-5). When he returned, Claimant experienced difficulty adjusting, and in 1973, a psychiatrist approved an honorable discharge form the military. (Tr. 54). Thereafter, Claimant bounced between nearly eighty jobs, he lived in about thirty states and in about sixty cities. (CX 18, p. 102, 144). All of his jobs consisted of manual labor in jobs requiring a medium level of exertion. (Tr. 161-63). In November 1996, Claimant obtained a job through an employment agency in Morgan City, Louisiana, and he began to work on Employer's vessel, the DISCOVERY, in LaBatre, Alabama. (Tr. 64-65).

Claimant began working on December 2, 1996. (EX 3, p. 3). Claimant was part of a group of temporary workers overhauling the DISCOVERY so that it could perform its mission of removing pipelines from the ocean's floor. (Tr. 66). Claimant's job was categorized as a "deck hand," he ate and slept aboard the DISCOVERY, and he had an expectation of employment when the overhaul was finished. (Tr. 73, 109-110).

On December 15, 1996, Claimant fell about eighteen inches off a winch and impaled his buttocks on a flange. (Tr. 69; EX 9, p. 1). Claimant went to an emergency room where he was diagnosed as having a contusion to the coccyx. (EX 12, p. 2). When Claimant's pain did not resolve, Claimant was eventually treated by Dr. William Kinnard. (CX 14, p. 2). Dr. Kinnard assessed a disc protrusion at L5-S1 that disturbed the dural sac and nerve root sleeve, as well as disc protrusions at L3-4 and L2-3. *Id*. at 36. On November 17, 1997, Dr. Kinnard admitted Claimant for a lumbar laminectomy/discectomy at L3, L4, and L5-S1. *Id*. at 54-57.

After undergoing the surgery, Claimant moved to Phoenix, Arizona, where he came under the care of Dr. Zipnick on February 3, 1998. (CX 15, p. 1). Claimant related to Dr. Zipnick that the surgery had made his condition worse, and Dr. Zipnick initially referred Claimant to pain management under the care of Dr. Laitin. *Id*. at 1, 17. A June 23, 1998 myelogram and post-myelogram demonstrated a large herniated disc fragment at L5-S1 displacing the thecal sac and nerve root, irregularity of the soft tissue at L4, and other changes at L2-4. *Id*. at 14-15. After performing a series of nerve root blocks, Dr. Zipnick recommended a second surgery on December 10, 1998 consisting of a lumbar laminectomy L5 and potentially L4, and decompression of the L4-5 and S1 nerve roots. *Id*. at 22.

After two different evaluations, Carrier refused to authorize the procedure and determined that Claimant had reached permanency with light duty work restrictions, and Employer terminated Claimant's compensation on June 21, 2000. (CX 5, p. 1; EX 13, p. 30). Meanwhile, Claimant did not return to work, and on December 1, 1998, he presented to the Veterans Administration Medical Center in Payson, Arizona where he was diagnosed with Post Traumatic Stress Disorder (PTSD) related to his experience in Vietnam. (CX 18, p. 144, 152-53). Based on his PTSD Claimant became entitled to total disability benefits form the Veterans Administration retroactive to May 1, 2000. (CX 19, p. 1). With his benefits, Claimant bought a house in December, 2001, and moved to Payson, Arizona where he currently resides. (Tr. 113).

B. Claimant's Testimony

Claimant testified that after leaving Vietnam in 1970, he was temporarily stationed at Fort Lewis, Washington. (Tr. 53). On his return, Claimant had problems doing things "the military way." (Tr. 53). The Army sent Claimant to see a psychiatrist at Fort Benning, Georgia, where he learned a lot of soldiers were having trouble adjusting after leaving Vietnam. (Tr. 54). The psychiatrist let Claimant out of the Army three years early under honorable conditions. (Tr. 54). After leaving the Army, Claimant engaged in numerous occupations including: televison repair work, construction jobs, microwave tower construction, and cement work. (Tr. 54-55). Claimant changed jobs frequently

due to anger, and he would pack everything in his truck and find a new job in a different place. (Tr. 55). Claimant averaged two to three months per job before he quit, and the longer jobs lasted about six months. (Tr. 55-56). Adding to his trouble, was the fact that Claimant drank too much and he suffered nightmares related to his experience in Vietnam. (Tr. 56). In all, Claimant estimated he had eighty different jobs. (Tr. 58). From 1992 to 1994, Claimant testified he owned a T.V. shop in Phoenix, working twelve hours a day and seven days a week, but he did not make any profit. (Tr. 60).

Eventually, Claimant heard about work on a vessel in Morgan City, Louisiana where he found a job with Employer through a labor referral service. (Tr. 64-65). Claimant passed Employer's physical examination and immediately began working on a vessel in LaBatre, Alabama. (Tr. 65). The vessel Claimant was working on needed four extra anchors installed so that it could work on ocean pipelines. (Tr. 66). Claimant's job was categorized as a deck hand, and he served on several different crews, mounting a crane, mounting winches, and re-steeling the ship for new anchor cables. (Tr. 66). Claimant began working at $57.00 a day, but after Employer suffered a high turn-over ratio, a supervisor offered Claimant $60.00 a day with a chance to make extra cash on the side and Employer gave another incentive telling Claimant it would "make sure" he got another job after the current one ended. (Tr. 66-67). Claimant understood these communications to mean his job would turn into a permanent position after the vessel repair had finished. (Tr. 109). It was not his understanding at the time of his initial hire that he was going to be a member of the vessel's crew, and he was unsure of whether he was going to be a permanent deck hand, nevertheless, Claimant applied to the Coast Guard for a merchant marine rating. (Tr. 73, 107, 110).

While working for Employer, Claimant labored seven days a week, and sometime longer than twelve hours a day because part of his job was to clean the site up for the next day's work. (Tr. 67). For his extra work, Claimant earned sixty dollars. (Tr. 67). Claimant slept and ate on the ship. (Tr. 68). The vessel was not in dry dock, but was floating in the water tied down by ropes. (Tr. 109). Occasionally the vessel was moved so the workers could better access different parts of the ship. (Tr. 109). All of Claimant's duties were on the vessel or centered around the vessel. (Tr. 110). The winch Claimant was repairing when he was injured was used to raise and lower an anchor so that the vessel could perform offshore work. (Tr. 110).

On December 15, 1996, Claimant fell from a winch onto the vessel's deck impaling his left buttocks on a protruding flange - a piece of metal six to eight inches long and eight inches wide. (Tr. 68-69). Claimant experienced immediate pain, jumped up, and hid behind some machinery in an effort to compose himself. (Tr. 69). Realizing that the pain was not going away, Claimant got help and went to the hospital. (Tr. 69). Claimant asked the attending physician for light duty work so he could return to the vessel, and for the next three days Claimant stayed in his bed. (Tr. 70-71). Claimant did attempt some work, but was unsuccessful, and he requested on several occasions to see a doctor prior to his scheduled appointment with an orthopaedist. (Tr. 71). Realizing that he could not work, Claimant left the job site to recover his truck in Morgan City and contacted Employer from there to obtain a doctor's appointment. (Tr. 73-74).

Claimant described his current back pain as follows:

> Severe? I don't really - - I don't mean to be light, I just don't understand how to answer the question, because I have back pain all the time. Sometimes it's just steady, like somebody got a hold of my spine, and then other times above that, it's like somebody poking me with a hot poker. Now that sensation ain't there all the time, but it comes and goes. And when it happens, its just like - - like maybe something is pushing on a nerve or something, I don't know. I'm no doctor, so all I know is pain.

(Tr. 76).

After having surgery, Claimant related he was unable to work, and his inability to earn a living affected his mental state. (Tr. 83). Work was therapeutic for Claimant and not working caused his mental issues to "blow up." (Tr. 84). Regarding his evaluation with Employer's physician, Dr. Gimbal, Claimant related he had ill feelings toward the doctor after he conducted a five minute examination and twice told Claimant to run up his hallway. (Tr. 85). Claimant limped when he ran and had to spend the next three days in bed. (Tr. 85). Claimant told Dr. Gimbal that his pain level was a ten, but Dr. Gimbal changed it to a three because he told Claimant that a ten meant he had to be hospitalized and a three meant he could still walk around. (Tr. 85).

Under the care of Dr. Laitin, Claimant stated he followed his home exercises, attempted volunteer work, and tried to walk. (Tr. 87-88). Claimant related, however, that his ability to walk was impaired by his back and hip pain and he could not travel over a few hundred yards more than once or twice a week. (Tr. 88-89). Claimant could only sit for about five to ten minutes without his leg falling asleep. (Tr. 98). Bending forward was not a problem, but Claimant had trouble straightening out his back after bending over. (Tr. 99). Claimant slept between two and five hours a night, slept better in the day time, and had no regular sleep habits. (Tr. 99-100). Claimant purchased a new automobile in 2001, and related that he did not have any trouble driving. (Tr. 116). Additionally, Claimant attempted to perform volunteer work at the V.A., but after he tested positive for TB he was not invited back. (Tr. 89). Claimant volunteered to answer the telephones at his apartment complex for a short period of time but that job ended with a change in ownership. (Tr. 90). Claimant was not volunteering at the time of the formal hearing, but he had plans to help the Elks Club do charitable work and he was still working to attain Dr. Laitin's recommendation to work two hours a day, five days a week. (Tr. 90).

Claimant applied to the jobs sent by IntraCorp., but he related that no employer called him back after questioning him about his physical condition. (Tr. 91). Claimant testified that he sometimes stopped by a potential employer on several occasions, and he filled out an application for each position the Employer's vocational specialist listed, but no employer contacted Claimant. (Tr. 94-95). Claimant also testified that he attempted to find another job at a T.V. repair shop, but he was not able to perform that work anymore because he could not lift the goods. (Tr. 96). Claimant indicated that he cold not obtain the position identified for him at Pitre Buick and Sanderson Lincoln

due to his bad driving record,[2] not based on his back or PTSD condition. (Tr. 129-30). After filling out an application, Claimant waited on the employer to contact him rather than taking the initiative to aggressively follow-up with the potential employer himself. (Tr. 133).

Claimant acknowledged he had suffered the effects of PTSD since 1970. (Tr. 119). Claimant was even court marshaled while in the military for being absent without leave. (Tr. 120-21). As a result Claimant was demoted from a E-5 ranking to an E-3 ranking and fined two-hundred dollars. (Tr. 121). In the mid 1980s, Claimant also sought treatment for medical problems (headaches) at the Fort Levenworth V.A. Hospital where he was a domiciliary. (Tr. 122). Claimant related he never received a diagnosis for PTSD at Fort Levenworth because that was before medical providers were aware of the mental illness. (Tr. 123). No physician who treated Claimant for his back ever made a referral to a psychiatrist or a psychologist. (Tr. 125). Prior to his workplace accident Claimant testified he could hold down a job for up to six months with his PTSD. (Tr. 136). After his accident, however, and after entering treatment for his PTSD at the V.A. Hospital, Claimant stated he could not even hold down a job for six months because he relived his experiences in Vietnam at every PTSD meeting. (Tr. 136). Additionally, Claimant related his physical inability to get around exacerbated his PTSD because he was unable to occupy his mind by focusing on other things. (Tr. 136). Finally, Claimant testified at trial that he wanted to undergo the surgery recommended by Dr. Zipnick in hopes that it could make him feel better. (Tr. 102-03).

C. Exhibits

C(1) Employer's First Report of Injury and Accident Reports

On December 21, 1996, in a Supervisor's Report of Accident Investigation, Claimant's supervisor described Claimant's position as a causal laborer, and reported Claimant bruised his left buttock on December 20, 1996, after slipping off a winch foundation and falling onto the deck. (EX 9, p. 1). Specifically, the accident report stated Claimant was tightening a nut with a wrench, lost his footing, and fell about eighteen inches. *Id*. at 2.

On January 15, 1997, Employer filed its First Report of Injury or Occupational Illness. (EX 1, p. 1). That report listed Claimant as a seven day employee making a daily wage of $60.00. Employer listed the nature of the injury as a bruised tail bone. *Id*. In a subsequent report, dated January 29, 1997, Employer listed Claimant as a six day employee, making $300.00 per week, and stated the nature of the injury was a contusion to the tail bone. *Id*. at 2.

C(2) USA Knollwood Hospital Records

On December 15, 1996, Claimant presented to USA Knollwood Hospital where he was preliminarily diagnosed with a contusion to the coccyx. (EX 12, p. 2). Claimant related to the

[2] Claimant testified that his driving record was marred by some DWI's, the last one occurring in the mid 1980s. (Tr. 96).

Hospital staff that he fell, straddling an object, and the staff noted swelling in Claimant's left buttock. *Id*. In a radiological report of Claimant's lumbar spine, there was a defect noted at L5 indicating probable spondylolysis, but the film demonstrated unremarkable characteristics of the bones, joints, and soft tissues. *Id*. at 4. Claimant spent nearly three hours at the hospital before being issued a wheel chair and discharged into the care of a co-worker. *Id*. at 2-3. Hospital staff instructed Claimant to follow up with an orthopaedist in one week. *Id*. at 6.

C(3) Medical Records of W.H. Johnson

On January 21, 1997, Claimant presented to Dr. Johnson at the Russo Industrial Medical Clinic in Morgan City, Louisiana, complaining low back pain following his workplace accident in December, 1996. (EX 16, p. 2). An examination did not reveal any point tenderness, Claimant had negative straight leg raises, a normal neurological exam, and x-rays were grossly unremarkable. *Id*. Dr. Johnson diagnosed a mild lumbar strain, and restricted Claimant to light duty with no heavy lifting. *Id*. at 2, 5. On January 28, 1997, Dr. Johnson took x-rays of both hips and Claimant's coccyx, but no gross abnormalities were noted. *Id*. at 2. Dr. Johnson changed Claimant to a "no work" status. (CX 13, p. 6). On February 12, 1997, Claimant reported he received some relief from EGS and hot packs, and he explained that he saw another orthopaedic surgeon in Houma who had scheduled more diagnostic testing. (EX 16, p. 2). Dr. Johnson continued Claimant's "no work" status. (CX 13, p. 7).

C(4) Medical Records of William Kinnard

On February 6, 1997, Claimant presented to Dr. Kinnard, an orthopaedist, complaining of continuing symptoms related to a December 15, 1996 workplace accident. (CX 14, p. 2). Specifically, Claimant complained of lower back, left buttock, and thigh pain. *Id*. Claimant explained his pain sometimes felt as if there was a "leader" running from his hip down to his knee, and occasionally it felt as if his legs were going to "sleep." *Id*. Claimant had negative straight leg raises and Dr. Kinnard felt that x-rays of Claimant's hip, low back, and coccyx were unremarkable. *Id*. at 2-3. Dr. Kinnard recommended a bone scan to rule out a bony injury and an EMG to rule out neurologic involvement. *Id*. at 3.

On March 4, 1997, Dr. Weir performed an EMG/nerve conduction study on the referral of Dr. Kinnard. (EX 14, p. 3). The study was consistent with acute S-1 radiculopathy. *Id*. at 4. Dr. Weir noted that Claimant's findings were rare, but he attributed them to the underlying S-1 radiculopathy, which was predominately affecting the nerves inneverating the gastrointestinal muscles. *Id*. at 4. Dr. Weir also opined that Claimant had an underlying sciatic nerve stretch injury. *Id*. A bone scan, also performed on March 4, 1997, demonstrated probable arthritic or degenerative changes in both ankles, and in the left hip near the region of the superior lateral margin of the acetabulum. *Id*. at 5. On March 14, 1997, Dr. Kinnard reviewed the results of the diagnostic tests and recommended an MRI to check for disc herniation causing S1 nerve root distribution. (CX 14, p. 10). Another possible source for Claimant's pain was a neuropraxis injury to the sciatic nerve as it exited the sciatic notch. *Id*.

A lumbar MRI, performed on April 2, 1997, demonstrated: lateral disc herniation at L3-4; mild posterior disc bulges at L2-3, L4-5, L5-S1; and nerve root impingement at L5-S1. (CX 14, p. 12). Dr. Kinnard opined the disc bulges at L2, L4, and L5 were degenerative. *Id*. at 13. The findings at the L5 level were consistent with the EMG findings and S1 root pathology. *Id*. Dr. Kinnard recommended epidural steroid injections for symptomatic relief. *Id*.

On April 18, 1997, Claimant presented to the emergency room after he backed into a doorknob and experienced a shocking sensation extending down his left hip. (EX 14, p. 9). Dr. Stephen Mallernee evaluated Claimant, but he did not feel there were acute neurological findings, and did not deem it appropriate to issue narcotic medication. *Id*. Instead, Dr. Mallernee diagnosed chronic back pain, and instructed Claimant to follow up with Dr. Kinnard. *Id*. On April 29, 1997, and July 23, 1997, Dr. Kinnard admitted Claimant to Terrebonne General Medical Center to undergo an epidural steroid injection. *Id*. at 18, 47. The injections provided some delayed relief. (CX 14, p. 23). On May 9, 1997, Dr. Kinnard opined that surgical intervention may be necessary and recommended a second opinion before making any treatment decisions. *Id*. at 19.

Dr. Cenac performed the second opinion evaluation and he recommended conservative treatment and a lumbar myelogram before contemplating surgery. (CX 14, p. 24). Reviewing the recommendations of Dr. Cenac, Dr. Kinnard expressed his agreement. *Id*. at 26. By August 6, 1997, Dr. Kinnard reported that epidural steroid injections not only failed to provide Claimant any relief, but actually increased his pain. *Id*. at 30. Dr. Kinnard requested authorization for surgical intervention. *Id*. Carrier authorized another lumbar myelogram and an enhanced CT scan as recommended by Dr. Cenac. *Id*. at 31.

On September 16, 1997, Claimant underwent the lumbar myelogram, which revealed wide AMI at L5-S1. (CX 14, p. 35). The post-myelogram lumbar CT scan showed: disc protrusion at L5-S1 disturbing the dural sac and left nerve root sleeve; disc protrusion and spondylolysis at L3-4 likely encroaching on the neural foramen; and disc protrusion with spondylolysis at L2-3 extending towards the neural foramen. *Id*. at 36. On September 24, 1997, Dr. Kinnard remarked the widened AMI on the myelogram rendered the reading insensitive to disc protrusions. *Id*. at 32. The CT scan was consistent with Claimant's earlier MRI. *Id*. As a result, Dr. Kinnard reasserted his recommendation for surgical intervention. *Id*. On November 17, 1997, Dr. Kinnard admitted Claimant for a lumbar laminectomy/discectomy at L3-L4, L5-S1. *Id*. at 54, 57. On December 4, 1997, Claimant complained that he could not lay down, sit, or walk. *Id*. at 58. Dr. Kinnard did not see any reason for the severity of Claimant's complaints. *Id*.

C(5) Medical Records of Dr. Christopher Cenac

On June 24, 1997, Dr. Cenac examined Claimant at the request of Employer. (EX 19, p. 13). After a physical examination, Dr. Cenac remarked Claimant had a diagnosis of a contusion to the sciatic nerve which was confirmed by an MRI showing a lateral disc protrusion at L3-4. *Id*. Claimant did not appear in distress and Dr. Cenac recommended continued non-operative modalities instead of surgical intervention. *Id*. Specifically, Dr. Cenac recommended a series of epidural injections and

an enhanced lumbar myelogram before any surgery was contemplated. *Id*. Dr. Cenac felt that Claimant was employable at a sedentary and/or light level of activity. *Id*. Dr. Cenac could not assign an impairment rating because Claimant was not at maximum medical improvement. *Id*. at 14.

On September 25, 1997, Dr. Cenac reviewed an enhanced CT myelogram report showing a disc protrusion with S1 nerve root encroachment. (EX 19, p. 8). Dr. Cenac noted this diagnostic finding was consistent with Claimant's physical findings. *Id*. Dr. Cenac opined that if epidural steroid injections did not help, and all non-operative modalities had been exhausted, surgery would be appropriate. *Id*. Dr. Cenac predicted Claimant would need six months to recover from surgery, and post-surgery, Claimant would have a fifteen percent anatomical impairment rating for the whole body. Claimant would likely be able to work at a light to medium level of work with lifting restrictions no greater than thirty-five pounds. *Id*.

C(6) Medical Records and Deposition of Richard I. Zipnick

On February 3, 1998, Dr. Zipnick, an orthopaedic surgeon in Glendale, Arizona, began treating Claimant in relation to his December, 1996, workplace accident. (CX 15, p. 1). Claimant reported his lumbar surgery actually made his condition worse, and Dr. Zipnick opined that Claimant's pain symptoms were consistent with problems at the L4 level. *Id*. Dr. Zipnick's impression was post-laminectomy syndrome with continued back and leg pain, and his plan was to conduct a new MRI with enhancement to evaluate the enhancement of scar tissue and to determine the feasibility of epidural steroid injections. *Id*. at 2. Dr. Zipnick also referred Claimant to Dr. Laitin for pain management. *Id*. Dr. Zipnick believed Claimant would eventually need more intensive pain management modalities, and he put Claimant on a total disability status until he could view the results of the MRI. *Id*.

Claimant underwent the MRI on February 26, 1998, which demonstrated: a lateral disc protrusion at L2-3; post operative changes with a laminectomy at L5-S1 with no evidence of residual or recurrent disc herniation; and the L3-4 level disc was too inadequately portrayed to make a good reading. (CX 15, p. 6). A supplemental MRI, performed on March 3, 1998 revealed: post surgical changes at L3-4 and L5-S1 with no evidence of stenosis or a herniated nucleus pulposus. *Id*. at 7. On March 19, 1998, Dr. Zipnick opined Claimant had epidural fibrosis and he wanted to attempt an L4 nerve block to see if Claimant had any nerve root involvement. *Id*. at 10. Dr. Zipnick continued Claimant in a no work status. *Id*. On May 12, 1998, Dr. Zipnick noted Claimant had persistent symptoms despite the L4 nerve root block, and Dr. Zipnick wanted to perform a myelogram to further investigate the L4 nerve root. *Id*. at 12. Despite the fact that Claimant remained symptomatic after the nerve root block, Claimant related pain when the anesthetic was injected in the same distribution as his symptoms which indicated that the L4 nerve root was part of the causation for Claimant's pain. (CX 16, p. 19-20).

A June 23, 1998 myelogram and post-myelogram CT demonstrated: a large herniated disc fragment at L5-S1 displacing the thecal sac and nerve root; irregularity of the soft tissue at L4; a syndesmophyte between the vertebral bodies of L3 and L4; and asymmetric hypertrophy at L3-4, and

L2-3. (CX 15, p. 14-15). Reviewing the diagnostic study on July 7, 1998, Dr. Zipnick commented Claimant's L5-S1 disc herniation was really a large soft tissue density pushing on the S1 nerve root. *Id*. at 16. Claimant appeared to have epidural fibrosis and Dr. Zipnick planed to do a S1 nerve block to sort out the diagnostic studies. *Id*. Claimant complained of pain, but Dr. Zipnick believed it was self-limited. *Id*. Dr. Zipnick also noted he referred Claimant to Dr. Laitin but authorization for that referral was never received. *Id*. Claimant underwent the S1 nerve root block on August 7, 1998. *Id*. at 17.

On November 3, 1998, Dr. Zipnick recommended a nerve root block at L5, and if Claimant's symptoms improved and then reoccurred, Dr. Zipnick opined Claimant should undergo a laminectomy, decompression, and neurolysis a the L5 nerve. (CX 15, p. 19). If the L5 nerve root block was not of any benefit, then Claimant's only option would be therapy and pain management. *Id*. After performing the nerve root block at L5, Dr. Zipnick noted on December 10, 1998, that the injection relieved Claimant's pain for twenty-four hours. *Id*. at 22. Accordingly, Dr. Zipnick recommended a lumbar laminectomy at L5 and potentially L4, and decompression of the L4-5 and S1 nerve roots. *Id*. Claimant consented to the surgery. *Id*.

Responding to inquiries from Carrier and the evaluation of Dr. Gimbal, Dr. Zipnick reported on January 26, 1999, that Dr. Gimbal's diagnosis of epidural fibrosis was correct, but Claimant had a positive myelogram consistent with his physical findings, he had an extruded disc fragment, and although stenosis was the result, his condition could be caused by hypertrophied ligaments, herniated discs, large posterior facet joints, or scars. (CX 15, p. 23). Dr. Zipnick believed Claimant would benefit from surgery. *Id*. Claimant's pain medications could not be reduced because a reduction caused him to become symptomatic and that was why Dr. Zipnick recommended surgery. *Id*. Claimant potentially reached maximum medical improvement if surgery was not an option. *Id*. Claimant would not likely be able to return to any manual labor and based on Claimant's ability to cope with his work situation, social status, and other reasons, Dr. Zipnick opined Claimant had a 60/40 chance of improvement. *Id*. In the past, Claimant did not demonstrate the ability to do repetitive lifting, bending or show the ability to lift over twenty-five pounds, and surgery would not likely improve Claimant's work restrictions. *Id*. at 24. Surgery would make Claimant's symptoms more comfortable in whatever level of activity he engaged in. *Id*. Regarding Dr. Gimbal's recommendation against surgery, Dr. Zipnick stated he did not know what Dr. Gimbal's expertise was, but it was generally up to the individual surgeon to determine the appropriateness of surgery where different surgeons would have different viewpoints. *Id*.

After reviewing Dr. McLean's evaluation of Claimant, Dr. Zipnick agreed that Claimant was not the best surgical candidate, meaning that even if surgery was successful Claimant may not ever return to meaningful employment. (CX 15, p. 25). Dr. Zipnick opined, however, that Claimant's inability to return to work was partly unrelated to his mechanical findings. *Id*. Post-surgery, and after a reasonable recovery period, Dr. Zipnick opined Claimant's work restrictions would be similar to those outlined by both Drs. McLean and Gimbal. *Id*. Dr. Zipnick did change Claimant's work restrictions on May 25, 1999, to light duty with no lifting over twenty-five pounds, position changes every hour, and no bending or twisting. *Id*. at 26.

On January 11, 2000, Dr. Zipnick responded to a job description analysis sent by Carrier. (CX 15, p. 27). After discussing all the positions with Claimant, Dr. Zipnick opined Claimant was unable to return to any meaningful employment at that time. *Id*. Dr. Zipnick lamented that his recommendation for surgery was denied repeatedly, he was a spinal surgeon who was not going to perform work assessments and analysis, and Dr. Zipnick discharged Claimant from his care with instruction for his case manager to find a non-spine surgeon to take over Claimant's care. *Id*. In the meantime, he issued a no work status for Claimant. *Id*.

On July 11, 2002, Dr. Zipnick met with Claimant's case manager. (CX 15, p. 29). Dr. Zipnick directly related Claimant's current symptoms to his workplace accident, and Dr. Zipnick expressed agreement with Dr. McLean's recommendation that Claimant "be made stationary with supportive care and a light duty status." *Id*. Dr. Zipnick still recommended surgery, but opined surgery would not likely improve Claimant's work status. *Id*. Any work status restrictions Dr. Zipnick may assign would be consistent with Dr. McLean's recommendations. *Id*.

On August 13, 2002, Dr. Zipnick noted the Veterans Administration assigned Claimant a one-hundred percent disability rating due to Claimant's PTSD. (CX 15, p. 31). New radiographic data showed disc space narrowing at L5-S1, flattening of the lumbar lordosis, and calcifications at L3-4. *Id*. Dr. Zipnick's impression was failed back syndrome and total disability related to post-traumatic stress disorder. *Id*. Dr. Zipnick believed Claimant was in a permanent, stationary condition. *Id*. Claimant was no longer interested in surgery, and Dr. Zipnick reconfirmed that surgery would not would not benefit Claimant functionally. *Id*. Dr. Zipnick assigned the following light duty work restrictions: no lifting over thirty pounds; no frequent lifting over fifteen pounds; no work longer than an eight hour day; no work longer than forty hours a week based on his back; no sitting over one to two hours; no walking over twenty to thirty minutes at a time; no more than occasional bending, stooping, climbing stairs, or kneeling; and Claimant must be able to change positions frequently. *Id*. Additionally, Claimant's pain medication would prohibit him from operating heavy machinery. (CX 16, p. 28). According to AMA guidelines, Claimant had a five percent impairment rating to his back, but Claimant was one-hundred percent disabled according to the Veterans Administration. (CX 15, p. 31).

In his August 15, 2002 deposition, Dr. Zipnick explained that everybody has scar tissue following surgery. (CX 16, p. 15). He also noted that Claimant reported consistent symptoms throughout Dr. Zipnick's treatments. *Id*. at 21. Further, Dr. Zipnick determined Claimant's current condition was related to his workplace accident because he found Claimant a believable patient, and Claimant had no pain free interval following his accident. *Id*. at 22. The reason Claimant was currently unable to work was due to a multiple of reasons, only one of which is his mechanical problem. *Id*. at 27. Claimant's future medical needs, without surgery, consisted of occasional injections not exceeding three per year, anti-inflammatory, nonaddicting medications, and physical therapy once a year. *Id*. at 31-32.

C(7) Medical Records of Steven Laitin

On March 13, 1998, Dr. Laitin, a pain management physician at St. Luke's Medical Center in Phoenix, Arizona, began treatment of Claimant on the referral from Dr. Zipnick. (CX 17, p. 1). Dr. Laitin assessed chronic low back pain and recommended treatment in the way of opioids to allow Claimant to return back to work. *Id*. On August 24, 1999, Dr. Laitin diagnosed failed back syndrome with clinical findings of de-conditioning, poor range of motion, and a poor gait. *Id*. at 3. Claimant's prognosis was stable, except Dr. Laitin expected Claimant to be able to return to work after a work hardening program. *Id*. Claimant would not likely be able to resume his former job. *Id*. at 4. Dr. Laitin restricted Claimant's work to no lifting over twenty-five pounds, and Dr. Laitin reserved judgment on how much of the day Claimant could sit and stand until after Claimant finished his work hardening program. *Id*. Claimant could perform any job that required either sitting or standing as long as his activity was not strenuous and allowed for adequate rest periods. *Id*. Unrelated to his workplace accident, Claimant's eyesight was extremely poor, and Dr. Laitin opined Claimant would be unable to obtain any employment without having glasses. *Id*. Dr. Laitin anticipated Claimant could return to work in two months time. *Id*.

On March 3, 2000, Claimant reported his pain was well managed on four Percocet tablets a day, but Claimant reported he was having trouble sleeping. *Id*. at 7. Claimant was seeing a psychiatrist, and Dr. Laitin remarked that Claimant had no new problems. *Id*. at 7. On April 25, 2000, Dr. Laitin noted Claimant was responding well to his work hardening program and was performing volunteer work. *Id*. at 8. On July 14, 2000, Dr. Laitin remarked Claimant was continuing his work hardening program but remained fragile and could not be pushed too fast. *Id*. at 10. On August 16, 2000, Claimant presented with a stiff back because he had twisted it accidently doing strenuous work. *Id*. at 11. Claimant also related he had to modify his activities in his work hardening program because he was having difficulty climbing stairs. *Id*. On September 20, 2000, Dr. Laitin related Claimant was actively seeking a job where he would not be required to stand more than one hour. *Id*. at 12. Claimant reported that if he stood for a longer period, his back would swell and pain would increase. *Id*.

On November 29, 2000, Claimant told Dr. Laitin that he was seeking part-time volunteer work. (CX 17, p. 14). On February 27, 2001, Dr. Laitin noted Claimant found volunteer work and was doing well overall. *Id*. at 17. In March, 2001, Claimant was seeking part-time employment, and Claimant's condition continued to improve to a point where he was doing well at home and in his activities. *Id*. at 18, 25. On April 3, 2002, Dr. Laitin remarked Claimant's activity had increased to a point where he could begin pool walking. *Id*. at 30. On May 29, 2002, Dr. Laitin noted Claimant was looking for volunteer work while coping with PTSD and anxiety. *Id*. at 32. In August, 2002, Claimant resumed doing volunteer work, but by September 2002, he had reduced his volunteer work to two hours a week due to his pain. *Id*. at 35-36. Dr. Laitin opined Claimant could eventually work up to four hours a day in a job. *Id*. at 36.

C(8) Medical Records of Dr. Joseph Gimbal

On January 7, 1999, Dr. Gimbal, an orthopaedist, examined Claimant on the request of Employer. (EX 20, p. 1). Claimant related to Dr. Gimbal that all activities bothered him and he was on narcotic prescriptions, but he enjoyed recreational activities such as fishing and playing pool. *Id*. at 4. Dr. Gimbal remarked Claimant was able to sit comfortably and was able to bend forward without restriction. *Id*. Claimant was also able to run up and down Dr. Gimbal's hallway without any difficulty. *Id*. Claimant self-rated his pain as a ten on a ten point scale at the beginning of the interview, but after having a discussion with Dr. Gimbal, Claimant lowered his subjective score to a three. *Id*. at 5. Claimant also expressed surprise when Dr. Gimbal related surgery could actually make his epidural fibrosis worse, could increase his level of pain, and could result in more strict limitations. *Id*. Claimant confirmed his activity and mobility were good, and that his low back and leg discomfort were mild. *Id*.

Dr. Gimbal diagnosed Claimant's problem as epidural fibrosis, but did not rule out a recurrent herniated disc. (EX 20, p. 5). Although Claimant's diagnostic studies showed a disc protrusion at L2-3, his symptoms did not support that pathology. *Id*. Dr. Gimbal opined Claimant's condition was stationary and Claimant should be weaned off of his narcotic medication. *Id*. Dr. Gimbal would not recommend repetitive bending or lifting over twenty-five pounds, but Claimant was able to work in a modified type job. *Id*. As of the date of Dr. Gimbal's examination, Claimant had reached maximum medical improvement with a ten percent permanent impairment pursuant to AMA guidelines. *Id*. The possibility of increasing Claimant's epidural fibrosis through surgery was significant enough that the risk/benefit ratio favored conservative treatment. *Id*.

C(9) Medical Records of Terry W. McLean

An x-ray ordered an interpreted by Dr. McLean on April 16, 1999, revealed: status post-laminectomy at L3-4 and L5-S1; and interval increase in calcification and syndesmophytes to the left at L3-4. (EX 13, p. 35). A myelogram and post-myelogram CT scan performed on April 16, 1999, demonstrated: post-laminectomy at L3-4 and L5-S1; recent herniated nucleus pulposus at L5-S1; and borderline stenosis at L4-5. *Id*. at 34. An MRI scan performed on the same day showed persistent recurrent disc protrusion at L5-S1; associated epidural fibrosis with facet arthropathy; and no evidence of significant neural compression at L4-5. *Id*. at 31.

On a ten point scale, Claimant self rated his pain level as a persistent eight in his hip and back. (EX 13, p. 28). Claimant related feelings of depression because nothing made his back pain any better. *Id*. Based on Claimant's diagnostic studies and physical exam, Dr. McLean opined Claimant suffered from post-laminectomy syndrome, and degenerative joint disease in the left hip. *Id*. at 29. Claimant's neurological examination was normal. *Id*. The results of Claimant's nerve root blocks were inconsistent in that the L5 block helped Claimant's hip pain but not his back pain, and the L4 block reproduced his pain symptoms. *Id*. Dr. McLean did not feel as if Claimant was a good surgical candidate in part because Claimant presented with more subjective than objective findings. *Id*. There was no clear cut evidence of radiculopathy, range of motion did not seem to recreate back, buttock,

or hip discomfort, and Claimant's pain may well be due to soft tissue trauma as a result of the interaction of the scaring in Claimant's back with the metal on the gluteal region. *Id*. at 29-30. Thus, Dr. McLean opined Claimant had reached permanency and he recommended work restrictions of: no lifting over thirty pounds, no lifting over fifteen pounds on a frequent basis, no working over eight hours a day for a forty hour week, no sitting over one or two hours, no walking over twenty to thirty minutes, no more than occasional bending, stooping, squatting, kneeling, and climbing, and Claimant should have frequent position changes. *Id*. at 30. On March 13, 2000, Dr. McLean approved a job as a gate/security guard, a lot attendant at a automobile dealership, and a job as a parking attendant. (EX 13, p. 7-24).

C(10) Medical Records from Carl T. Hayden Veterans Administration Medical Center

On December 1, 1998, Ronald R. Bowen at the Veterans Administration Medical Center in Payson, Arizona noted Claimant was homeless, living in his car, and Claimant tested positive for PTSD with a history of ethyl alcohol abuse that stopped in 1992. (CX 18, p. 152-53). Claimant had a nomadic lifestyle, frequent job changes and occasional nightmares. *Id*. at 153.

In a compensation and pension examination, Claimant's experience in Vietnam and its subsequent aftermath were explained as follows:

> Veteran states that he was never the same after he left Vietnam. He was in Vietnam from 1968 for a period of twenty-eight months and admitted that he killed 9 Viet Cong who had invaded their compound. He felt very guilty and stated "I cried; I was not taught to do that [to kill]." Veteran cried as he related this statement. He was involved in numerous fire fights and was surrounded by Viet Cong. He witnessed dead bodies all around, including civilians. During one of the firefights he was lost and did not know where to turn. On another occasion, there was some intense fire fights and during a big attack, he felt "no one will help me, they are all pot heads." Veteran was very "bothered by the whole lot." He was distressed, he shook as [he] cried, saying "there were so many people dead." The Veteran did not drink while he was in Vietnam, but after discharge, he drank at bars for many years. He avoided the mall and does not like crowds. He says that his drinking continued until 1992 when he stopped drinking. He reports that he prefers to sit alone in a room and stays in touch with the outside world reading a newspaper. He admits that he has no friends and has a serious problem with trust. Veteran indicated that he has had a sleeping problem for many years and having nightmares 4 to 5 times a month. On occasions, he wakes up screaming. He has intrusive thoughts and memories of traumatic events in Vietnam. He was able to talk about a major assault when he saw others killed and was involved in fire fights that lasted, at times, up to 2 days, being involved in direct combat during these events at such times. He states that he avoids talking about his experiences or any thoughts that he had with the trauma that he experienced in Vietnam. He also admits that he has difficulty recalling some of the experiences in Vietnam. He talked about his restlessness and irritability and the fact that he had

> more than 80 jobs since he left the service. He added that when he gets into conflict with people, he escapes to another town.

(CX 18, p. 101-02).

On November 18, 1999, Bonnie Babkian authored a medical psychology consultation report stating Claimant had lived in thirty states and sixty cities since returning from Vietnam. (CX 18, p. 144). Claimant was suffering from depression and continued PTSD. *Id*. Claimant related this was his first psychological assessment, he denied suicide attempts, had some homicidal ideas in the past while drinking, but had quit drinking in 1992. *Id*. Claimant complained of insomnia, irritability, intrusive memories of combat, social alienation, social isolation, and social withdraw. *Id*. Claimant related a history of having difficulty with authoritative figures and he had difficulty keeping jobs. *Id*. Claimant also had some anxiety, racing thoughts and some obsessions/compulsions. *Id*. Ms. Babkian's initial impression was PTSD and depression related to Claimant's medical condition. *Id*.

In a psychological assessment performed by Virginia Vesco on December 28, 1999, Claimant related he cried two to three times per day, his only outlet was television, he was nomadic, he never worked a job for more than a year, and although he was once physically fit, he was currently unemployable due to injury. (CX 18, p. 136). Although Claimant enjoyed playing pool prior to his workplace injury that activity had become too painful. *Id*. at 137. Regarding his military service, Claimant reported he was a microwave radio repairman in Vietnam and was stationed on one of the first signal sites to be overrun. *Id*. at 138. Claimant denied flashbacks and denied hyper-vigilance. *Id*. Over the past three years, Claimant reported his depression had intensified. *Id*. at 139.

In a psychological history and assessment performed by Dr. Ronald Nazareth on February 7, 2000, Claimant related he suffered from depression, flashbacks, and nightmares. (CX 18, p. 131). Dr. Nazareth noted Claimant had five previous surgeries, including one to his spine. *Id*. Dr. Nazareth also noted Claimant was verbose in his productions, had mood swings, was presently hypo-manic, but also became depressed and had crying episodes. *Id*. at 132. His provisional diagnosis was Bipolar illness and PTSD. *Id*.

In a follow-up visit with Ms. Vesco on March 20, 2000, Claimant reported most of his problems surfaced after his back injury. (CX 18, p. 129). On April 20, 2000, Ms. Vesco noted Claimant had a history of staying awake for three days at a time. *Id*. at 126. On May 1, 2000, Claimant won entitlement to service connected disability benefits related to a seventy percent service related impairment due to his PTSD. (CX 19, p. 1). In June, 2000, Claimant presented to Ms. Vesco stating he was able to sleep about ten hours a night due to his medication. (CX 18, p. 123).

In a July 7, 2000 PTSD note authored by Dennis Grant, Claimant stated he had a history of multiple jobs, had an inability to advance an any job he held, and his work was controlled by his PTSD symptoms. (CX 18, p. 120). Claimant also reported that he had problems with anger outbursts in the workplace setting and against his supervisors, had problems concentrating, had flashbacks, had difficulty in coping with workplace stress, and when his stress did not cause him to

walk off the job site, his supervisor had to give him special consideration in order for him to perform the work assigned to him. *Id*. Claimant also reported fatigue, an inability to find a job he liked, an inability to manage school type classes, and he had given up on any idea of having meaningful employment or a meaningful education. *Id*. Mr. Grant recommended to Claimant that he enroll in a PTSD group. *Id*. at 120-21. On July 20, 2000, Dr. Gomburza Abad noted Claimant was pleasant and friendly without any evidence of a thought disorder as to form and content, no classic evidence of Bipolar disorder, and no complaints of PTSD symptoms. *Id*. at 116. By August 31, 2000, Ms. Vesco noted Claimant was having difficulty sleeping characterized by the inability to fall asleep until four or five o'clock in the morning. *Id*. at 115. Dr. Abad remarked on March 7, 2001, that Claimant's PTSD was stable. *Id*. at 82. On March 8, 2001, Dr. Abad signed off on a report that stated Claimant's PTSD was exacerbated by his physical injury. *Id*. at 81. Dr. Abad also labeled Claimant as having a moderately severe impairment in his abilities to: relate to other people, to perform daily functions, and to respond appropriately to co-workers. *Id*. at 80-81. Claimant suffered severe impairments in his abilities to: understand, respond, and carry out instructions; respond appropriately to supervision; respond to customary work pressures; and in performing simple, complex, repetitive, and varied tasks. *Id*.

On June 15, 2001, Dr. Abad commented that Claimant was receiving disability benefits for his PTSD and was feeling better now that he was receiving some money. (CX 18, p. 57). Dr. Abad's assessment was PTSD and Bipolar disorder presently in remission. *Id*. Similarly, on August 17, 2001, Ms. Vesco assessed a depressive disorder related to Claimant's general medical condition and PTSD without mentioning a Bipolar disorder. *Id*. at 50. On December 21, 2001, however, Claimant related to Dr. Abad that he felt stress over the "current war" and was stressed over the paperwork associated with purchasing his own home. *Id*. at 31. Claimant's nightmares and intrusive thoughts continued and Dr. Abad assessed PTSD and Bipolar disorder. *Id*.

On March 20, 2002, Virginia Vesco reported Claimant's PTSD was evidenced by intrusive thoughts, nightmares twice a week, hyper vigilance, and two an one-half hitches in Vietnam from 1968-1970. (CX 18, p. 14). Ms. Vesco issued Claimant a book on PTSD, issued The Healing and Trauma Tape, and her goal was to stop Claimant's intrusive thoughts in a seven month program ending in March, 2003. *Id*. at 15. Claimant also had Bipolar disorder evidenced by decreased memory and concentration, lack of energy, depression, difficulty sleeping, racing thoughts and mild suicidal ideals. *Id*.

On July 12, 2002, a physician at the Veterans Hospital listed Claimant's numerous problems as: skull fracture, essential hypertension, permanent partial disability with a treatment history, prolonged post-traumatic stress disorder, Bipolar I Disorder, an unspecific, chronic low back pain since 1996 with a related discectomy and a herniated fragment at L5-S1, and chest pains. (CX 18, p. 5).

C(11) Employer's Payroll File and Claimant's Wage Records

Employer's payroll file indicated the following sums were paid to Claimant during his employment:

Period Ending	Days	Pay Rate	Amount
12-04-96	3.00	57.00	$171.00
12-18-96	14.00	60.00	$840.00
01-01-97	5.00	60.00	$300.00

(EX 3, p. 1-7).

Claimant's Social Security earnings report revealed the following information:

Employer	Year	Earnings
Henry D. Sykes	1995	$2,898.00
	1996	$3,726.00
D&D Electronics	1995	$15,680.84
Employment Contractors, Inc.	1996	$1,983.02
Hargett Mooring & Marine, Inc.	1996	$1,011.00

(CX 9, p. 2-3).

C(12) IntraCorp Vocational Rehabilitation Reports and the Testimony of Paula O'Neill

Ms. O'Neill, a vocational counselor with Intra Corp in Phoenix, Arizona, attempted to place Claimant in a position based on the restrictions set by Dr. McLean. (Tr. 243). Ms. O'Neill was unaware that Claimant suffered from PTSD until the date of the formal hearing. (Tr. 247). Ms. O'Neill did not believe Claimant had any transferable skills based on his past experience, did not think Claimant had up to date skills to perform television repair work and did not think Claimant had the ability to lift televisions. (Tr. 251). Ms. O'Neill actually completed her labor market survey on June 25, 1999, updated that survey on August 8, 2000 without noting any significant changes, and a updated it a third time on October 12-18, 2002. (Tr. 255, 269-72). Ms. O'Neill never asked any employer if they would hire a person on narcotic medication. (Tr. 287-88). All of the jobs Ms. O'Neill identified were in Phoenix, Arizona, and she thought the distance from Claimant's home in Payson, Arizona, about eighty miles one way, was too far to commute. (Tr. 289-90). The following jobs were listed by Ms. O'Neill as suitable for Claimant based on his workplace accident:

Standard Parking - Parking Lot Attendant/Cashier. Available on July 6, 1999, this job entailed receiving cash from customers entering a pre-paid garage. It required occasional sitting, standing, walking, reaching, bending, and twisting. The employee had to carry up to ten pounds a day up to fifteen times, and seldom had to carry up to twenty-five pounds. Simple grasping was required six to eight hours per day. The job paid $6.25 per hour. Dr. McLean approved this position for

Claimant on March 13, 2000. This position was updated on October 11, 2002, and an opening was filled three weeks prior. The employer stated it hired approximately thirty part time workers each year, and the pay had increased to $6.55 per hour.

Pitre Buick Isuzu - Lot Attendant at Automobile Dealership. Available on September 1, 1999, this job entailed moving new and used vehicles around the lot, driving sold vehicles, and cleaning vehicles. It required occasional sitting, standing, reaching, climbing, bending, and squatting. It also required frequent twisting and turning, negligible lifting, and constant to occasional foot control. The position was very physical because it was mostly performed outdoors in extreme heat. The job paid $6.50 - $7.00 per hour. Dr. McLean approved this job for Claimant on March 13, 2000. This job was updated as available on October 11, 2002. The position was noted to have a high turnover rate with ten hires in the past year. On rare occasions, a lot attendant may be required to lift a thirty pound tire, but the employer was willing to accommodate Claimant's restriction to consider him equally with other candidates.

Sanderson Lincoln Mercury - Lot Attendant at Automobile Dealership. This position was available on September 1, 1999, and entailed locking and unlocking up to 250 cars a day, starting cars, jump starting cars, and refueling cars as needed. The employee would move cars around lot, deliver cars to customers, empty trash pails, run errands, and pick up cars within two hours driving distance. The job required frequent standing, occasional sitting, walking, reaching, climbing, squatting, and twisting, and required minimal lifting under twenty-five pounds. The job paid $5.50 per hour. Dr. McLean approved this position for Claimant on March 13, 2000. This position was updated as available on October 11, 2002. At that time the position paid $6.50 per hour, and an additional job duty of lifting a spare tire was noted, but the employer stated that the requirement could be accommodated.

Pedus Security - Gate/Security Guard. Available on September 1, 1999, this job entailed waiving to residents with valid permits, checking un-permitted visitors against a roster, recording information and calling residents for permission to allow vehicle into neighborhood. The job required frequent sitting and standing, occasional walking and reaching, and lifting up to ten pounds up to forty times a day. The employer desired a mature individual with good public relation skills, and the employee may occasionally drive around the area in a golf cart. The job paid $6.00 per hour. Dr. McLean approved this job for Claimant on March 13, 2000. This position was updated as available on October 11, 2002. The pay had increased to $7.00 per hour.

Pinkerton Security - Gate/Security Guard. Available on September 1, 1999, this job entailed patrolling residential, commercial properties, and parking lots on foot or by car. Guards should be able to move with some rapidity. If a guard worked in the gate house then the work required: occasional sitting, standing, walking, reaching, bending, squatting, and twisting and turning, and lifting up to ten pounds. Some placements required CPR training and the employer would be selective in job placement after fully understanding a worker's restrictions. The job paid $7.50 per hour. Dr. McLean approved this job for Claimant on March 13, 2000. The position was updated as available on October 11, 2002. The pay had increased to $8.00 per hour.

Continental Security - Gate/Security Guard. Available on September 1, 1999, this position was sedentary and required a worker to sit behind a desk to watch monitors. The worker may be asked to patrol the property on foot, some jobs required more standing than sitting, and while working construction sites the guard may be sitting in a car or shack checking vehicles in and out. The job required occasional sitting, standing, walking, and reaching, and required negligible lifting. The job paid $6.00 per hour. Dr. McLean approved this job for Claimant on March 13, 2000. The position was updated on October 11, 2002, and the employer's name had changed to AT Systems Security. Three to five guards were hired on a weekly basis and the pay scale ranged from $6.00 to $7.00 per hour.

Ampco System Parking - Parking Lot Attendant. Available on June 25, 1999, this job entailed taking tickets and money from customers exiting a parking garage. The worker could alternate sitting and standing as needed in a ticket booth and the hours were from 4:00 p.m. until midnight. It paid $7.00 per hour. This position was updated on October 11, 2002. A high turnover rate was noted and the employer stated approximately twenty positions a month were open. The salary on October 11, 2002, was $7.50 per hour.

Vigilante Security - Gate Guard. Available on June 25, 1999, this job entailed checking vehicles in and out of residential commercial properties, and required the worker to be able to read, write, and speak English. The applicant was required to undergo a background check and provide three character references. Physical requirements included sitting and standing as needed, and the ability to lift up to thirty pounds. The employer was willing to work with restrictions and the job paid $6.25 per hour. This job was updated as available on October 11, 2002. The employer changed its name to VSS Security, and increased the salary to $8.00 per hour.

Wells Fargo Guard Services - Gate Guard. Available on July 6, 1999, this job required occasional reaching, sitting, and standing as needed when a visitor or resident enters, walking around the guard house and taking one step down from the guardhouse to greet visitors. Lifting was limited to under ten pounds.

Five Star Ford - Lot Attendant, Automobile Dealership. Available on July 7, 1999, this job entailed moving vehicles around the service lot, washing cars in an automatic car wash after service, cleaning windows, hand drying the car, and vacuuming the interior. The job required occasional sitting, walking, reaching, climbing, bending, squatting, and twisting. It required frequent standing, and while the employer was willing to eliminate monthly lifting of supplies, the job required employees to move fast and most of the workers were young.

(EX 10; 11; 11A).

C(13) Claimant's Job Log

Claimant filled out a job log from IntraCorp that revealed the following information:

Date	Employer	Disposition
7/9	Pitre Buick	Called. Does not have a good driving record and should not be driving on medications
7/12	Sanderson Lincoln	Called. Does not have a good driving record and should not be driving on medications
7/13	Vigilante Security	Called. No work while under a doctor's care
7/13	Continental	Visited. Told to call first
7/14	Continental	Called. No work while under a doctor's care
7/14	Pinkerton Security	Visited. No work while under a doctor's care
7/14	Pedus Security	Visited. No medical clearance
7/15	AMP Co. SYS Parking	Visited and needed to get complete medical clearance
7/15	Standard Parking	Visited and needed to get medical clearance. No pain killers
8/30	Pedus Security	Completed application and interview
8/30	Continental Security	Completed application and interview
8/30	Vigilante Security	Completed application and interview
8/30	Pitre Buick	Completed application and interview
8/31	Sanderson Lincoln	Completed application and interview
8/31	AMP Co. Parking	Could not find location
8/31	Standard Parking	Completed application and interview

(CX 22, p. 1-2).

C(14) Testimony and Vocational Report of Tom Stewart & Associates

Claimant reported to Mr. Stewart that he was born in June 1948, did not have any trouble driving, he graduated from high school, and after high school he trained for twenty-seven weeks as a Radio Microwave Repairman in the Army. (CX 23, p. 4-5). Since leaving the Army in 1973, Claimant held approximately eighty jobs, categorized as a TV repairman (about fifteen years), construction work, day laborer, and technician/repairer of microwave towers. *Id*. at 5. Mr. Stewart stated all these jobs fell into a medium category of work or higher. (Tr. 161-62).

Considering Claimant's age, education, work history, physical restrictions, and his PTSD, Mr. Stewart opined Claimant was not capable of sustaining work in the general competitive labor market. (CX 13, p. 5). Even if Claimant were to find a job within his physical restrictions, Claimant would likely experience an exacerbation of his PTSD symptoms. Additionally, Claimant was consuming four 250 milligram tablets of Percocet a day. *Id*. at 6. Percocet is a narcotic causing drowsiness,

dizziness, and fatigue. *Id*. While taking this medication, Mr. Stewart related Claimant should not operate heavy machinery or operate automobiles. *Id*; (Tr. 168). Furthermore, Claimant needed to lay down several time a day due to back pain and that was an impediment to finding a suitable job. (CX 13, p. 6). While Claimant may be able to obtain a job, he would not likely be able to sustain a job. (Tr. 162).

Mr. Stewart testified that he had counseled persons with both back problems and PTSD. (Tr. 151). Mr. Stewart testified that his training as a vocational rehabilitation counselor directed him to place more weight on a treating physician as the source of an injured worker's limitations because the treating physician knew the patient better and saw the patient more often. (Tr. 154). Mr. Stewart related that Claimant told him his PTSD had gotten worse since his injury because he had to sit around and think about it. (Tr. 158-59). Assuming Claimant's workplace accident did not exacerbate his PTSD, Claimant was already operating at a disadvantage by not being able to hold a job much longer than eight months. (Tr. 172). Factoring in light duty work restrictions, Mr. Stewart testified it would be difficult to place Claimant based on his profile. (Tr. 172). Without a symptoms related to PTSD, Mr. Stewart opined Claimant could work at a light duty level, restricted by pain to a limited number of hours a day, and Claimant would also be restricted in his employability based on his intake of narcotic medication. (Tr. 176-77). Also, considering Claimant's subjective reports of pain, his need to lie down during the day, and his need to alternatively sit and stand, Mr. Stewart did not think Claimant was employable. (Tr. 177).

Mr. Stewart testified he usually asked the source of a client's present income because a person who was receiving disability benefits would be less motivated to find work than a person who was strapped for cash. (Tr. 218). Also, Claimant never related to Mr. Stewart that taking Percocet affected his ability to drive. (Tr. 220). Claimant's only apparent academic deficiency was a difficulty in spelling, but he had basic literary skills. (Tr. 221-22).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he is not a Jones Act seamen because he was a land based worker only transitorily assigned to make vessel repairs. Claimant argues he could not resume his former job after his injury and his workplace accident aggravated his underlying PTSD making him totally disabled. Dr. Zipnick's recommended surgery is both a reasonable and necessary operation that would enable him to recover from his workplace accident because the surgery would reduce Claimant's level of pain and make him more comfortable in his activities. Additionally, Claimant asserts he is entitled to mileage expenses for keeping appointments with his pain management specialist, Dr. Laitin. Under Section 10(c) of the Act, Clamant contends his average weekly wage was $450.00 per week based on his actual earnings at the time of the accident, cash payments for doing extra work, and the expectancy of continuing on in that employment. Finally, Claimant argues Employer is liable for

Section 14(e) penalties for untimely filing a notice of controversion after terminating Claimant's compensation.

Employer contends that Claimant is excluded from coverage under the act because he was a Jones Act seaman. Regarding the merits of the case, Employer argues Claimant's PTSD, which pre-existed his workplace accident, is in no way related to or exacerbated by Claimant's workplace injury. Claimant's PTSD renders him unemployable and not his back injury. Based on Claimant's short period of employment and his wage records, Employer asserts Claimant's average weekly wage was $300.00 per week. As established by Ms. O'Neill's labor market survey, Employer argues suitable alternative employment was available to Claimant in Phoenix, Arizona in June, 1999. Moreover, Claimant offered no proof he suffered from a loss of wage earning capacity considering his prior unstable work history and the fact that Claimant would not likely continue working for Employer had the accident not occurred. Regarding Claimant's request for surgery, Employer contends his physical condition did not require any surgical procedure, Claimant was not a good candidate for surgery, and any operation would only provide Claimant with a chance to improve.

B. Status as a Master or Member of a Crew Under § 902(3)(G)

Employer argued post-hearing that Claimant was not a covered employee under the Act because he qualified as a member of a crew under § 902(3)(G). 33 U.S.C. § 902(3)(G) (2002). The Jones Act (codified at 46 U.S.C. § 688), covers any person employed as a "seaman," and the Supreme Court determined that the Jones Act and the Longshore Act are mutually exclusive remedies. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991). In other words, "master or member of a crew" under Section 902(3)(G) is synonymous with the definition of a "seaman" under the Jones Act. *Id*. A two part test is used to determine whether a worker was a Jones Act seaman:

> First ... an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission ... Second, . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Hufnagel v. Omega Services, Industries, Inc., 182 F.3d 340, 346 (5th Cir. 1999), quoting *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554, 117 S. Ct. 1535, 1540, 137 L. Ed. 2d 800 (1997), quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S. Ct. 2172, 2190, 132 L. Ed. 2d 314 (1995).

Under the first prong of the test, an employee must perform some task to contribute to the function of the vessel or to the accomplishment of its mission. *Chandris*, 515 U.S. at 368. Contributing to the function of a vessel or to the accomplishment of its mission is a relatively low threshold and all who work at sea in the service of a ship are eligible for seaman's status. *Wilander*, 498 U.S. at 354-55 (finding that seaman status does not turn on whether the employee has a transportation related function as long as the employee is doing the ship's work). *See also Harbor Tug*, 520 U.S. at (stating the parties did not dispute the fact that painting the housing structure of a

tug contributed to the function of the vessel or the accomplishment of its mission); *Chandris*, 515 U.S. at 350 (stating the parties stipulated that a superintendent engineer who was responsible for updating and maintaining electronic communications equipment for a fleet of vessels contributed to the vessel's mission); Martin J. Norris, *The Law of Seamen* § 2:3 (4th ed. 2002) (detailing cases finding the following workers, among others, to have seaman status: cook, clerk, engineer, fireman, barber, bartender, muleteer, coal passer, dipper tender, fisherman, ferry hand, deck hand, diver, sealer, steward, pilot, and porter).

Even if the employee's particular job contributes to the function of a vessel or the accomplishment of its mission, the employee must also have the requisite employment related connection to a vessel. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405 (1991). The purpose of the second prong of the test is to separate sea based maritime employees from those land based workers who have only a "transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris*, 515 U.S. at 368. In other words, the employment-related connection to a vessel focuses on whether the employee's duties take him to sea. *Harbor Tug*, 520 U.S. at 555. There is a dual prong analysis as to whether an employee's duties contribute to the function of a vessel; requiring both duration (the temporal nexus) and nature (the functional prong). *Roberts v. Cardinal Services, Inc.*, 266 F.3d 368, 374 (5th Cir. 2001). In determining whether a employee's claim meets the durational analysis the Supreme Court instructed:

> Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases. . . . Nevertheless, we believe that courts, employers, and maritime workers can all benefit from reference to these general principles. And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict.

Chandris, 515 U.S. at 371.

In *Heise v. Fishing Co. of Alaska, Inc.*, 79 F. 3d 903, 906-07 (9th Cir. 1996), the Ninth Circuit determined a temporary laborer was not contributing to the function of the vessel or the accomplishment of its mission. In *Heise*, a fishing vessel put in for repairs and Heise, a temporary laborer whose job was expected to last about one month - and who hoped to continue working on the ship when it sailed - was injured securing the vessel's mooring lines. *Id*. at 904. Heise had never worked on a vessel before, he did not fill out an employment contract, and he was allowed to sleep on the vessel while the repairs were underway. *Id*. During the repair process the vessel was moved through navigable waters by the use of a tug. *Id*. The Ninth Circuit reasoned that a seamen was one who worked "at sea in the service of a ship" and did not include land based workers who happen to

be working on a vessel when injured. *Id*. at 906. While Heise hoped to continue his employment in service of the vessel, and even though the captain had assured Heise that there was a good chance he could continue on, no formal offer of employment was ever made. *Id*. Thus, Heise's connection to the vessel was limited to the time that the vessel was undergoing maintenance and repairs. *Id*. Because Heise was only an expectant seaman, and not a seaman in being, Heise was a land based worker and not entitled to a Jones Act remedy. *Id*. at 907.

Like *Heise*, Claimant was also a land based worker, hired to perform temporary work on a vessel, and had the expectancy of being hired as a full time employee by the vessel's owner. Like *Heise*, Claimant slept and ate aboard the DISCOVERY, although he was not required to, and like the vessel in *Heise*, the DISCOVERY was briefly moved in navigable waters for the purpose of accommodating repairs. Claimant had never worked on board a vessel in the past, thus, status as a seamen had not attached when Claimant began working on the DISCOVERY. As a land based worker, Claimant did not contribute to function or mission of the vessel because Claimant did not have any vested interest in the vessel's function or mission after it left port. Claimant's connection to the DISCOVERY was only transitory, and nothing in his temporary employment exposed him to the perils of the sea. Accordingly, I find that Claimant does not fall within the exclusion to the Act for those who are a member of a vessel's crew.

C. Aggravation of Claimant's Underlying PTSD

The parties do not dispute that Claimant suffered a back injury as a result of his workplace accident. Employer contests that Claimant's workplace accident did not aggravate his underlying PTSD.

C(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2002). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury

is insufficient to shift the burden of proof to the employer). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) (compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), *aff'd sub nom., Gardner v. Director,* OWCP, 640 F.2d 1385 (1st Cir. 1981).

On December 1, 1998, Ronald R. Bowen at the Veterans Administration Medical Center in Payson, Arizona reported that Claimant tested positive for PTSD. (CX 18, p. 152-53). Claimant had a nomadic lifestyle, frequent job changes and occasional nightmares related to his experience in Vietnam. *Id*. at 153. On November 18, 1999, Bonnie Babkian issued an initial impression that Claimant had PTSD and depression related to his medical condition. *Id*. at 144. In a follow-up visit with Ms. Virginia Vesco on March 20, 2000, Claimant reported most of his mental problems surfaced after his back injury. *Id*. at 129. On May 1, 2000, Claimant won entitlement to service connected disability benefits related to a seventy percent service related impairment due to his PTSD. (CX 19, p. 1). On March 8, 2001, Dr. Abad signed off on a report that stated Claimants' PTSD was exacerbated by his physical injury. (CX 18, p. 81). The Department of Veterans Affairs found Claimant was disabled on April 20, 2001, due to failed back syndrome/degenerative disc disease and PTSD. *Id*. at 2, 11. On August 17, 2001, Ms. Vesco assessed a depressive disorder related to Claimant's general medical condition and PTSD. *Id*. at 50.

Likewise, Claimant testified that although he had suffered the effects of PTSD since 1970, (Tr. 119), he was able to hold down a job for up to six months. (Tr. 136). After his accident, however, and after entering treatment for his PTSD at the V.A. Hospital, Claimant stated he could not even hold down a job for six months because he relived his experiences in Vietnam at every PTSD meeting. (Tr. 136). Additionally, Claimant related his physical inability to get around, exacerbated his PTSD because he was unable to occupy his mind by focusing on other things. (Tr. 136). Accordingly, I find that Claimant presented a *prima facie* case that his workplace injury aggravated the affects of his PTSD.

C(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption - the kind of evidence a reasonable mind might accept as adequate to support a conclusion - only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

Employer argues that the evidence and testimony establishes, beyond question, that Claimant's PTSD is in no way related to nor has it been exacerbated his workplace accident. Claimant never reported to any physician that he suffered from PTSD, and he did not inform Dr. Zipnick of that fact until August, 2002. (Tr. 112). Additionally, the Veterans Administration determined Claimant was not employable due to his mental problems. (CX 19, p. 2). Likewise, Mr. Stewart testified Claimant would not be able to maintain employment based on the impairments listed for Claimant's PTSD in the Veterans Administration decision. (Tr. 174). Mr. Stewart also related that Claimant had a long history of PTSD problems and it was aggravated by increased stress. (Tr. 172, 227-28). Claimant never mentioned the fact that he suffered from PTSD to Employer's vocational counselor, Ms. O'Neill. (Tr. 247). Claimant's PTSD was exacerbated by such factors as crowds, fireworks, stress, the war on terrorism, and the terrorist attacks. (CX 18, p. 31, 37, 43, 46, 102).

I find that Employer failed to present substantial evidence to sever the connection between Claimant's workplace accident and aggravation of Claimant's PTSD. Employer's evidence only establishes that Claimant suffered from PTSD both before and after his accident. Claimant's uncontradicted testimony related that his physical inabilities exacerbated his PTSD because he was unable to focus his mind on other things. (Tr. 136). While the record establishes that Claimant had around eighty different jobs since leaving Vietnam, and shows that he was unable to maintain any meaningful employment over six months, Claimant failed to work any job following his workplace accident. (Tr. 58). Claimant's April, 2001 total disability rating issued by the Department of Veterans Affairs was issued after Claimant's workplace accident on December 15, 1996. (CX 19, p. 1; ALJX 1). While Claimant had suffered the affects of PTSD since 1970, he never sought treatment for the problem until he tested positive for the affliction on December 1, 1998. (CX 18, p. 152-53). Regarding the exacerbation of his PTSD Claimant stated:

> I was out of work, I couldn't work and this was making things really tough for me. I seemed to go through a period where I didn't care whether I lived or died, because if I couldn't work, I couldn't exist. And work is what I've always done. It don't matter that I had a whole lot of jobs, I was a good worker, and I could go back to any place I worked; they would hire me back. Any place, because I was a good worker.
>
> I got upset, I forgot where I was at.
>
> . . . .
>
> Yes, I was having mental problems, and my soon to be wife again said, "you got to go to the V.A. You got to seek some help." . . . And she's the reason that I went and sought help. She had seen these problems before, I guess, and I didn't realize I had 'em, and so I started seeing psychiatrists and psychologists and all that up at the V.A. That was starting in '98, and that's when they first diagnosed PTSD, and I never knew I had a problem with it.
>
> JUDGE KENNINGTON: So, you were - - when you couldn't find work, that was affecting you mentally?
>
> THE WITNESS: Intensely, because when I go to work, I want to know how to work as hard as you can, and it seemed to please employers and if that's what they wanted, that's what I wanted to give 'em. So, it occupies your mind.
>
> If you're working hard, all the time, you don't have time to think about all those other things.

(Tr. 84-85).

Considering Claimant's hearing testimony, the VA reports of Virginia Vesco and Dr. Abad documenting an exacerbation of PTSD symptoms after Claimant's workplace accident, and the fact that Claimant had the demonstrated ability to work, albeit at nearly eighty jobs, while suffering from PTSD before his workplace accident, I find that Claimant not only presented sufficient evidence for a *prima facie* case of causation, but based on the record as a whole, Claimant established by a preponderance of the evidence that his workplace accident aggravated his underlying PTSD symptoms.

D. Section 7 Benefits - Reasonableness and Necessity of Dr. Zipnick's Recommended Surgery

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2002). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). Under the Administrative Procedures Act, the claimant bears the ultimate burden of persuasion by a preponderance of the

evidence that medical treatment is reasonable and necessary. *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 2259, 512 U.S. 267, 281, 129 L. Ed. 2d 221 (1994).

D(1) Establishing a *Prima Facie* Case of Reasonableness and Necessity

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Here, Claimant's treating physician Dr. Zipnick recommended that Claimant undergo a lumbar laminectomy at L5 and potentially L4, and decompression of the L4-5 and S1 nerve roots as a further treatment for his workplace injury. (CX 15, p. 19). Dr. Zipnick opined Claimant had a sixty percent chance of improving if he underwent the surgery. *Id*. at 23. While surgery would not improve on Claimant's work restrictions, it would make him more comfortable in whatever level of activity Claimant engaged in. *Id*. at 24. Accordingly, Claimant presented a *prima facie* case that the recommended surgery was both reasonable and necessary.

D(2) Rebuttal of Claimant's *Prima Facie* Case

To rebut a claimant's *prima facie* showing that a recommended medical treatment is either not reasonable or not necessary, the employer is required to produce substantial evidence to that effect. *Conoco, Inc.*, 194 F.3d 684, 690 (5th Cir. 2000)(stating that the hurdle is far lower than a "ruling out" standard); *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). Employer met its burden in this case.

On January 7, 1999, Dr. Gimbal, an orthopaedist, diagnosed Claimant's problem as epidural fibrosis, but did not rule out a recurrent herniated disc. (EX 20, p. 5). Although Claimant's diagnostic studies showed a disc protrusion at L2-3, his symptoms did not support that pathology. *Id*. Dr. Gimbal opined Claimant's condition was stationary and Claimant should be weaned off of his narcotic medication. *Id*. The possibility of increasing Claimant's epidural fibrosis through surgery was significant enough that the risk/benefit ratio favored conservative treatment. *Id*.

Likewise, after Dr. McLean reviewed diagnostic studies showing a herniated nucleus pulposus/recurrent disc protrusion at L5-S1 and epidural fibrosis, Dr. McLean opined Claimant suffered from post-laminectomy syndrome, and degenerative joint disease in the left hip. (EX 13, p. 29). Claimant's neurological examination was normal. *Id*. The results of Claimant's nerve root blocks were inconsistent in that the L5 block helped Claimant's hip pain but not his back pain, and the L4 block reproduced his pain symptoms. *Id*. Dr. McLean did not feel as if Claimant was a good surgical candidate in part because Claimant presented with more subjective than objective findings. *Id*. There was no clear cut evidence of radiculopathy, range of motion did not seem to recreate back, buttock, or hip discomfort, and Claimant's pain may well be due to soft tissue trauma as a result of the interaction of the scaring in Claimant's back with the metal on the gluteal region. *Id*. at 29-30. Accordingly, Employer presented substantial evidence that Dr. Zipnick's recommendation was unreasonable and unnecessary because the risk/benefit ratio disfavored surgery and Claimant was not a good candidate for surgery.

D(3) Reasonable and Necessary Based on the Record as a Whole

Once the employer offers sufficient evidence to rebut a claimant's *prima facie* case, the claimant must establish entitlement to the medical treatment based on the record as a whole. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If based on the record the evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281. The opinion of a treating physician is entitled to special consideration. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6 (2001); *Cf. Consolidated Coal Co. v. Hold*, 314 F.3d 184, 187-88 (4th Cir. 2002) (finding that the special consideration extended to a treating physician cannot be accorded greater weight than other physicians base only on his status); *Consolidation Coal Co. v. Director, OWCP*, 54 F.3d 434, 438 (7th Cir. 1995) (disparaging a "mechanical determination" favoring a treating physician when the evidence is equally weighted). An ALJ may credit the report of a treating physician over others as long as there is substantial evidence in the record to support such a conclusion. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001).

Based on a series of nerve root blocks, Dr. Zipnick concluded the L4 nerve root was part of the causation of Claimant's pain complex. (CX 16, p. 19-20). Reviewing further diagnostic studies in June, 1998, Dr. Zipnick interpreted the findings as showing a L5-S1 disc herniation that was really a large soft tissue density pushing on the S1 nerve root. (CX 15, p. 16). Claimant appeared to have epidural fibrosis. *Id*. After a L-5 nerve block relieved Claimant's pain symptoms, and after those symptoms reoccurred, Dr. Zipnick recommended a lumbar laminectomy at L5 and potentially L4, and decompression of the L4-5 and S1 nerve roots. *Id*. at 22.

Responding to inquiries from Carrier and the evaluation of Dr. Gimbal, Dr. Zipnick responded on January 26, 1999, that Dr. Gimbal's diagnosis of epidural fibrosis was correct, but Claimant had a positive myelogram consistent with his physical findings, he had an extruded disc fragment, and although stenosis was the result, his condition could be caused by hypertrophied ligaments, herniated discs, large posterior facet joints, or scars. (CX 15, p. 23). Dr. Zipnick believed Claimant would benefit from surgery. *Id*. Claimant's pain medications could not be reduced because a reduction caused him to become symptomatic and that is why Dr. Zipnick recommended surgery. *Id*. Claimant would not likely be able to return to any manual labor and based on Claimant's ability to cope with his work situation, social status and other reasons, Dr. Zipnick opined Claimant had a 60/40 chance of improvement. *Id*. Regarding Dr. Gimbal's recommendation against surgery, Dr. Zipnick stated he did not know what Dr. Gimbal's expertise was, but it was generally up to the individual surgeon to determine the appropriateness of surgery in a case such as Claimant's where different surgeons have different viewpoints. *Id*. Dr. Zipnick further explained that everybody has scar tissue following surgery, but Claimant's symptoms were consistent with his industrial industry. (CX 16, p. 15-16).

After reviewing Dr. McLean's evaluation of Claimant, Dr. Zipnick again agreed that Claimant was not the best surgical candidate, meaning that even if surgery was successful Claimant may never return to meaningful employment. (CX 15, p. 25). On August 13, 2002, Dr. Zipnick noted Claimant was no longer interested in surgery, and Dr. Zipnick reconfirmed that surgery would not benefit

Claimant functionally. (CX 15, p. 31). Although Claimant had reservations about undergoing surgery, he stated at the formal hearing that he was prepared to have the operation done. (Tr. 102-03).

In *Amos v. Director, OWCP*, 153 F.3d 1051, 1052 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), the claimant, Amos, sustained an injury to his right acromion which caused impingement syndrome. Amos' treating physician recommended surgery, but two orthopedists hired by the employer opposed the procedure because it would not likely make Amos asymptomatic, and performing surgery was a judgment call that could make his condition worse. *Id*. at 1052-53. At a formal hearing the ALJ denied the recommended surgery as neither reasonable nor necessary and credited the medical reports of the employer's physicians as more well reasoned. *Id*. at 1053. The Ninth Circuit reversed, reasoning that nothing in the Act required "injured workers to abdicate the right to make their own decisions about their medical care." *Id*. at 1054. Recognizing the employer's right to refuse unreasonable and unnecessary treatment, the Ninth Circuit stated that "when a patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Id*. Because neither of employer's orthopedists opined that surgery was unreasonable, but only favored a more conservative approach, and considering the special consideration given to the recommendations of a treating physician, the ALJ's denial of the recommended surgery was not based on substantial evidence. *Id*.

Like, *Amos*, I find that it is Claimant, in consultation with his treating physicians, who has the right to chart his own medical destiny. The fact that Claimant's functional capacity will not improve as a result of the surgery does not render the procedure unreasonable or unnecessary. When a claimant's pain is an impediment to performing work activities, it is not unreasonable to hold the employer liable for corrective surgery. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989)(finding a physician's treatments necessary to relieve pain symptoms). While Dr. Gimbal stated Claimant's symptoms stemming from the L5 disc were probably related to epidural fibrosis, Dr. Gimbal did not rule out the fact that Claimant had a herniated disc. (EX 20, p. 5). Furthermore, when Dr. Gimbal issued his evaluation, he was not privy to the results of Claimant's L5 nerve root block, the results of which led Dr. Zipnick to recommend surgery. (CX 15, p. 22; EX 13, p. 27). Dr. McLean opined Claimant was not a "good candidate" for surgery. (EX 13, p. 30). Dr. Zipnick agreed with Dr. McLean's statement inasmuch as surgery would not improve Claimants' functional capacity. (CX 15, p. 25). Much like *Amos*, two qualified physicians recommended conservative treatment, and surgery is judgement call that could make Claimant's symptoms worse. Dr. Zipnick found Claimant's pain complaints to be credible, (CX 16, p. 22), and faced with two valid alternative for treatment of his workplace injury, I find Claimant's election to undergo Dr. Zipnick's treatment is both reasonable and necessary under the Act.

E. Medical Benefits - Mileage Expenses

In general, an employer whose worker was injured on the job is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding Inc. v. Director, OWCP* , 991 F.2d 163 (5th Cir. 1993);

Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

Claimant asserted that Employer had not paid him for mileage expenses incurred to see Dr. Laitin, a pain management specialist to whom Claimant was referred by Dr. Zipnick. (Tr. 101; CX 15, p. 2). Having established that Claimant's injuries were caused by his workplace accident, I find that Claimant is entitled to medical benefits under the Act. Medical benefits include mileage expenses Claimant reasonably expended in seeking medical treatment. *See Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983).

F. Nature and Extent of Disability and Date of Maximum Medial Improvement

Claimant seeks continuing temporary total disability benefits from December 16, 1996 and continuing. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2002). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

F(1) Nature of Claimant's Injury

On December 15, 1996, Claimant presented to USA Knollwood Hospital where he was preliminarily diagnosed with a contusion to the coccyx. (EX 12, p. 2). In a radiological report of Claimant's lumbar spine, there was a defect noted at L5 indicating probable spondylolysis, but the film demonstrated unremarkable characteristics of the bones, joints, and soft tissues. *Id*. at 4.

On March 4, 1997, Dr. Weir performed an EMG/nerve conduction study that demonstrated results consistent with S-1 radiculopathy. (EX 14, p. 3-4). Dr. Weir also opined that Claimant had an underlying sciatic nerve stretch injury. *Id*. at 4. A lumbar MRI, performed on April 2, 1997, demonstrated: lateral disc herniation at L3-4; mild posterior disc bulges at L2-3, L4-5, L5-S1; and nerve root impingement at L5-S1. (CX 14, p. 12). Dr. Kinnard opined the disc bulges at L2, L4, and L5 were degenerative. *Id*. at 13. The findings at the L5 level were consistent with the EMG findings and S1 root pathology, and the diagnostic findings were confirmed in a September 16, 1997 lumbar myelogram and post-myelogram CT scan. *Id*. at 12, 35-36. Based on these test results, Dr. Kinnard admitted Claimant to surgery on November 17, 1997, for a lumbar laminectomy/discectomy at L3-L4, L5-S1. *Id*. at 54, 57.

Moving to Arizona after his surgery, Claimant reported to Dr. Zipnick in February, 1998, relating that surgery made his condition worse, and Dr. Zipnick opined that Claimant's pain symptoms were consistent with problems at the L4 level. (CX 15, p. 1). A MRI taken on February 26, 1998 demonstrated: a lateral disc protrusion at L2-3; post operative changes with a laminectomy at L5-S1 with no evidence of residual or recurrent disc herniation; and the L3-4 level disc was too inadequately portrayed to make a good reading. (CX 15, p. 6). A supplemental MRI, performed on March 3, 1998 revealed: post surgical changes at L3-4 and L5-S1 with no evidence of stenosis or a herniated nucleus pulposus. *Id*. at 7.

On March 13, 1998, Dr. Laitin recommended treatment in the way of opioids to allow Claimant to return back to work. (CX 17, p. 1). On August 24, 1999, Dr. Laitin diagnosed failed back syndrome with clinical findings of de-conditioning, poor range of motion, and a poor gait. *Id*. at 3. On March 19, 1998, Dr. Zipnick opined Claimant had epidural fibrosis. *Id*. at 10. After a series of nerve blocks, Dr. Zipnick determined that the L4 nerve root was part of the cause for Claimant's pain symptoms. (CX 16, p. 19-20).

A June 23, 1998 myelogram and post-myelogram CT demonstrated: a large herniated disc fragment at L5-S1 displacing the thecal sac and nerve root; irregularity of the soft tissue at L4; a syndesmophyte between the vertebral bodies of L3 and L4; and asymmetric hypertrophy at L3-4, and L2-3. (CX 15, p. 14-15). Reviewing the diagnostic study on July 7, 1998, Dr. Zipnick commented Claimant's L5-S1 disc herniation was really a large soft tissue density pushing on the S1 nerve root. *Id*. at 16. Claimant appeared to have epidural fibrosis. *Id*. After a nerve root block at L5 temporarily relieved Claimant's pain, Dr. Zipnick recommended a lumbar laminectomy at L5 and potentially L4, and decompression of the L4-5 and S1 nerve roots. *Id*. at 22.

On January 7, 1999, Dr. Gimbal diagnosed Claimant's problem as epidural fibrosis, but did not rule out a recurrent herniated disc. (EX 20, p. 5). Although Claimant's diagnostic studies showed a disc protrusion at L2-3, his symptoms did not support that pathology. *Id*. An x-ray ordered and interpreted by Dr. McLean on April 16, 1999, revealed: status post laminectomy at L3-4 and L5-S1; and interval increase in calcification and syndesmophytes to the left at L3-4. (EX 13, p. 35). A myelogram and post-myelogram CT scan performed on April 16, 1999, demonstrated: post-laminectomy at L3-4 and L5-S1; recent herniated nucleus pulposus at L5-S1; and borderline stenosis

at L4-5. *Id*. at 34. An MRI scan performed on the same day showed persistent recurrent disc protrusion at L5-S1; associated epidural fibrosis with facet arthropathy; and no evidence of significant neural compression at L4-5. *Id*. at 31. Based on Claimant's diagnostic studies and physical exam, Dr. McLean opined Claimant suffered from post-laminectomy syndrome and degenerative joint disease in the left hip. *Id*. at 29. Claimant's pain may well be due to soft tissue trauma as a result of the interaction of the scaring in Claimant's back with the metal on the gluteal region. *Id*. at 29-30.

On August 13, 2002, Dr. Zipnick reviewed Veterans Administration records and new radiographic data showed disc space narrowing at L5-S1, flattening of the lumbar lordosis, and calcifications at L3-4. *Id*. Dr. Zipnick's impression was failed back syndrome and total disability related to post-traumatic stress disorder. (CX 15, p. 31).

As documented by the Veterans Administration, the nature of Claimant's PTSD is such that Claimant suffers from insomnia, irritability, intrusive memories of combat, social alienation, social isolation, social withdraw, difficulty with authoritative figures, flashbacks, nightmares, anxiety, racing thoughts and some obsessions/compulsions. (CX 18, p. 144).

Accordingly, I find the nature of Claimant's injury is: a large herniated disc fragment at L5-S1 displacing the thecal sac and nerve root; irregularity of the soft tissue at L4; a syndesmophyte between the vertebral bodies of L3 and L4; and asymmetric hypertrophy at L3-4, and L2-3; epidural fibrosis; and failed back syndrome that aggravates an underlying PTSD condition. Claimant's physical findings necessitate a second surgery consisting of a lumbar laminectomy at L5 and potentially L4, and decompression of the L4-5 and S1 nerve roots to relieve pain.

F(3) Extent of Claimant's Injury

On January 21, 1997, Claimant presented to Dr. Johnson at the Russo Industrial Medical Clinic in Morgan City, Louisiana, complaining low back pain following his workplace accident in December, 1996. (EX 16, p. 2). Dr. Johnson restricted Claimant to light duty with no heavy lifting. *Id*. at 2, 5. After reviewing some diagnostic studies on January 28, 1997, Dr. Johnson changed Claimant to a "no work" status, which he continued on February 12, 1997. (CX 13, p. 6-7).

On May 9, 1997, Dr. Kinnard opined that surgical intervention may be necessary. (CX 14, p. 19). In a second opinion evaluation, Dr. Cenac recommended continued conservative treatment and recommended that Claimant could work at the sedentary or light level. (CX 14, p. 25). After additional diagnostic studies, however, Dr. Kinnard performed a lumbar laminectomy/discectomy at L3-L4, L5-S1 on November 17, 1997. (CX 14, p. 54, 57).

After moving to Arizona, Dr. Zipnick began treating Claimant on February 3, 1998, for post-laminectomy syndrome and referred Claimant to pain management. (CX 15, p. 1-2). On March 13, 1998, Dr. Laitin, a pain management physician, recommended treatment in the way of opioids to allow Claimant to return back to work. (CX 17, p. 1). Even with the medication, Claimant would

not likely be able to resume his former job. *Id*. at 4. Dr. Zipnick believed Claimant would eventually need more intensive pain management modalities, and he put Claimant on a total disability status. (CX 15, p. 1-2). Dr. Zipnick repeated his no work restriction on March 19, 1998. *Id*. at 10.

After conducting an evaluation of Claimant on January 7, 1999, Dr. Gimbal reported that he would not recommend Claimant engage in any repetitive bending or lifting over twenty-five pounds, but Claimant was able to work in a modified type job. (EX 20, p. 5). As of the date of Dr. Gimbal's examination, Claimant had reached maximum medical improvement with a ten percent permanent impairment pursuant to the AMA guidelines. *Id*. On April 16, 1999, Dr. McLean, an independent medical examiner, opined Claimant had reached permanency and he recommended work restrictions of: no lifting over thirty pounds, no lifting over fifteen pounds on a frequent basis, no working over eight hours a day for a forty hour week, no sitting over one to two hours, no walking over twenty to thirty minutes, no more than occasional bending, stooping, squatting, kneeling, and climbing, and Claimant should have frequent position changes. (EX 13, p. 30).

On May 25, 1999, Dr. Zipnick changed Claimant's work restrictions to light duty with no lifting over twenty-five pounds, position changes every hour, and no bending or twisting. *Id*. at 26. On August 24, 1999, Dr. Laitin restricted Claimant's work to no lifting over twenty-five pounds, and Dr. Laitin reserved judgment on how much of the day Claimant could sit and stand until after Claimant finished his work hardening program. (CX 17, p. 4). Claimant could perform any job that required either sitting or standing as long as his activity was not strenuous and allowed for adequate rest periods. *Id*.

On January 11, 2000, Dr. Zipnick responded to job a description analysis sent by Carrier. (CX 15, p. 27). After discussing all the positions with Claimant, Dr. Zipnick opined Claimant was unable to return to any meaningful employment at that time. *Id*. Dr. Zipnick lamented that his recommendation for surgery was denied repeatedly, he was a spinal surgeon who was not going to perform work assessments and analysis, and Dr. Zipnick discharged Claimant from his care with instruction for his case manager to find a non-spine surgeon to take over Claimant's care. *Id*. In the meantime, he returned Claimant to a no work status. *Id*. at 27. Dr. Laitin, however, noted that Claimant was able to perform some volunteer work on April 25, 2000. (CX 17, p. 8). On July 11, 2002, however, Dr. Zipnick opined that work status restrictions he may assign would be consistent with Dr. McLean's recommendations. (CX 15, p. 29).

On July 14, 2000, Dr. Laitin remarked Claimant was continuing his work hardening program, performing some volunteer work, but remained fragile and could not be pushed too fast. (CX 17, p. 10). On August 16, 2000, Claimant related he had to modify his activities in his work hardening program because he was having difficulty climbing stairs. *Id*. at 11. On September 20, 2000, Dr. Laitin related Claimant was actively seeking a job where he would not be required to stand more than one hour. *Id*. at 12. Claimant reported that if he stood for a longer period, his back would swell and pain would increase. *Id*.

On November 29, 2000, Claimant told Dr. Laitin that he was seeking part-time volunteer work. (CX 17, p. 14). On February 27, 2001, Dr. Laitin noted Claimant found volunteer work and was doing well overall. *Id*. at 17. In March, 2001, Claimant was seeking part-time employment, and Claimant's condition continued to improve to a point where he was doing well at home and in his activities. *Id*. at 18, 25. On April 3, 2002, Dr. Laitin remarked Claimant's activity had increased to a point where he could begin pool walking. *Id*. at 30. On May 29, 2002, Dr. Laitin noted Claimant was looking for volunteer work and was dealing with PTSD and anxiety. *Id*. at 32. In August, 2002, Claimant resumed doing volunteer work, but by September, 2002, he had reduced his volunteer work to two hours a week due to his pain. *Id*. at 35-36. Dr. Laitin opined Claimant could eventually work up to four hours a day in a job. *Id*. at 36.

On August 13, 2002, Dr. Zipnick noted Claimant was on one-hundred percent disability from the Veterans Administration because of PTSD. (CX 15, p. 31). Dr. Zipnick assigned the following light duty work restrictions as related to Claimant's back injury alone: no lifting over thirty pounds; no frequent lifting over fifteen pounds; work no longer than an eight hour day; no work longer than forty hours a week based on his back; no sitting over one to two hours; no walking over twenty to thirty minutes at a time; no more than occasional bending, stooping, climbing stairs, or kneeling; and Claimant must be able to change positions frequently. *Id*. Additionally, Claimant's pain medication would prohibit him from operating heavy machinery. (CX 16, p. 28). According to AMA guidelines, Claimant had a five percent impairment rating to his back, but Claimant was one-hundred percent disabled according to the Veterans Administration. (CX 15, p. 31).

Regarding his PTSD, Claimant was adjudicated totally disabled by the Department of Veterans Affairs, retroactive to May 1, 2000. (CX 19, p. 1). In a July 7, 2000 PTSD note authored by Dennis Grant, Claimant stated he had a history of multiple jobs, had an inability to advance an any job he held, and his work was controlled by his PTSD symptoms. (CX 18, p. 120). Claimant also reported that he had problems with anger outbursts in the workplace setting, had problems concentrating, had flashbacks, difficulty in coping with workplace stress, and when his stress did not cause him to walk off the job site, his supervisor had to give him special consideration in order for him to perform the work assigned to him. *Id*. Claimant also reported fatigue, an inability to find a job he liked, an inability to manage school type classes, and that he had given up on any idea of having meaningful employment or a meaningful education. *Id*. Dr. Abad also labeled Claimant as having a moderately severe impairment in his abilities to: relate to other people, to perform daily functions, and to respond appropriately to co- workers. *Id*. at 80-81. Claimant suffered severe impairments in his abilities to: understand, respond, and carry out instructions; respond appropriately to supervision; respond to customary work pressures; and in performing simple, complex, repetitive, and varied tasks. *Id*.

Based on the evidence, I find that Claimant was temporarily totally disabled following his December 15, 1996 workplace accident through Dr. Kinnard's November 17, 1997 lumbar laminectomy/discectomy at L3-L4, L5-S1, and continuing. Based on Claimant's objective physical findings, Claimant could have returned to work pursuant to Dr. Gimbal's restrictions set on January 7, 1999 because those restrictions were essentially the same as issued by Dr. McLean on April 16,

1999, and those issued by Dr. Zipnick on August 13, 2002, and Claimant's objective physical findings remained largely unchanged after January 7, 1999. Moreover, Dr. Zipnick stated that he agreed with Dr. McLean's work restrictions. I also note that Dr. Gimbal's work restrictions were set well over a year after Claimant's surgery, and Dr. Zipnick anticipated a recovery period of three months for a similar type of surgery. (CX 15, p. 25).

Factoring in Claimant's subjective pain, however, results in a more severe limitation. Claimant credibly testified concerning his pain limitations. (Tr. 76). As documented by Dr. Latin, Claimant's pain prohibited him from engaging in meaningful employment and Claimant could not be pushed too hard due to his fragile condition. (CX 17, p. 10). Although Dr. Latin originally anticipated in August,1998, that Claimant could return to "acceptable employment" within two months, that prognosis never came to fruition. By April 25, 2000 Dr. Laitin noted Claimant was able to perform limited volunteer work. *Id*. at 8. By September, 2002, Dr. Latin noted Claimant had reduced the amount of volunteer work he was performing to two hours a week. *Id*. at 3. Although Claimant was not able to perform much work due to pain in September, 2002, Dr. Laitin hoped that Claimant could eventually work up to four hours a day. Thus, combining Claimant's objective physical limitations with his subjective reports of pain, I find Claimant was only able to perform two hours of work a week due to his pain beginning on April 25, 2000.

Finally, factoring in the aggravation of Claimant's PTSD symptoms, I find that Claimant's was more limited in his activities as of December 1, 1998, the day Claimant first sought treatment for his mental problems. Claimant's PTSD effects the extent of his injury in that he is more prone to workplace stress, he needed special consideration in order for him to perform work, he had difficulty with social interaction, and he suffered numerous moderate to sever impairments as discussed *supra*.

G. Loss of Wage Earning Capacity

G(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, there is no evidence that Claimant can perform his former job. Dr. Latin reported that Claimant would not likely be able to resume his former job even after a work hardening program. (CX 17, p. 4). Mr. Stewart testified that all of Claimant's former jobs fell within he medium category of work or higher, (Tr. 161-62), and the extent of Claimant's back injury alone is such that he cannot perform

more than light level work in a very limited basis. Thus, Claimant established a *prima facie* case of total disability following his December 15, 1996 workplace accident.

G(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

G(2)(a) Claimant's Age Background, Experience, and Physical Limitations

Claimant was born in 1948, graduated high school, trained for twenty-seven weeks as a Radio Microwave Repairman in the Army, served in Vietnam, and held nearly eighty jobs following his discharge from the Army. (CX 23, p. 4-5). Although Claimant's lifestyle was nomadic, he purchased a house in Payson, Arizona, where he has lived since December, 2001. (Tr. 113). Based on Claimant's past work experience, Ms. O'Neill testified that Claimant did not have any transferable skills, and even though Claimant performed television repair work in the past, she did not think

Claimant's skills were up to date. (Tr. 251). The extent of Claimant's workplace injury, the limiting pain symptoms and the aggravation of Claimant's underlying PTSD are discussed, *supra*, Section IV, Part F(3).

G(2)(b) Jobs in Claimant's Community

Employer's vocational counselor identified numerous jobs in June 1999, August 2000, and she updated those positions in August, 2002. *See supra*, Section III, Part C(12). While some the jobs identified by Ms. O'Neill may have fallen within the light duty restrictions outlined by Drs. Gimbal, McLean, and Zipnick, no job falls within Claimant's limitations considering the demonstrated work capability documented by Dr. Laitin of two hours of work per week. Furthermore, Ms. O'Neill was not informed of Claimant's underlying PTSD and did not take that factor into account in identifying alternative jobs. Accordingly, I find that Employer failed to establish any suitable alternative employment based on Claimant's age, background, experience, and limitations.

H. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

H(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury." 33 U.S.C. § 910(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Here, Claimant only worked for Employer during the month of December, 1996, and this time frame cannot be characterized as substantially the whole of the year making a Section 10(a) calculation inappropriate.

H(2) Section 10(b)

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan*, 24 BRBS at 153; *Lozupone*, 12 BRBS at 153. Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class,

who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Here, there are no similar situated workers in the record upon which to base a Section 10(b) calculation.

H(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part*, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the over-riding concern, in calculating wages under Section 10(c). *Gatlin*, 936 F.2d at 823. The Board will affirm a determination of average weekly wage under Section 10(c) if the amount represents a reasonable estimate of Claimant's earning capacity at the time of the injury. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Claimant argues that his average weekly wage is $450.00 per month because he was required to work twelve hours a day, seven days a week at the rate of $60.00 per day. Additionally, Claimant asserts that during the first two weeks of his employment, he worked beyond twelve hours on three occasions for which he was paid $60.00. Employer asserts Claimant's average weekly wage was

$300.00 per week based on a five day work week and a wage rate of $60.00 per day. I find both arguments overstate Claimant's earning capacity at the time of his injury.

Claimant testified that the longest period he could hold a job was for about six months before leaving, and he averaged two to three months per job. (Tr. 55-56). Since leaving the military in 1973, Claimant held about eighty jobs. (CX 23, p. 5). Because Claimant's wage earning capacity was hampered by his pre-existing PTSD, I do not find it appropriate to base Claimant's wage earning capacity solely on the work he was performing at the time of his injury. Rather, I find the fairest approximation of Claimant's wage earning capacity is reflected by his actual earnings during 1995 and the eleven and one-half months he worked during 1996. During 1995, Claimant earned $2,898.00 from Henry D. Sykes, and $15,680.84 from D&D Electronics. (CX 9, p. 2-3). During 1996, Claimant earned $3,726.00 from Henry D. Sykes, $1,983.02 from Employment Contractors, Inc., and $1,011.00 from Hargett Mooring & Marine, Inc. *Id*. While working for Employer in 1996, Claimant worked fourteen days, including the day of his injury on December 15, at the rate of $60.00 per day and he earned $60.00 in cash bonus payments for performing extra work. (Tr. 67; EX 3, p. 1-7). This results in a total pre-injury wage payment of $900.00. Thus, from January 1, 1995 to December 15, 1996, Claimant earned a total of $26,198.86 for the preceding 102 weeks prior to his workplace accident. This results in an average weekly wage of $256.85, and a corresponding compensation rate of $200.27.

I. Penalties

Under Section 14(e) of the Act, "[i]f any installment of compensation payable without an award is not paid within fourteen days after it becomes due . . . there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice [of controversion] is filed . . . or unless such nonpayment is excused by the deputy commissioner. . . ." 33 U.S.C. § 914(e) (2002).

Here, Employer terminated compensation benefits beginning on June 21, 2000. (CX 5, p. 1). Employer did not file a notice of controversion until April 16, 2001. (CX 3, p. 1). Accordingly, I find Claimant is entitled to a ten percent penalty on all benefits due between June 21, 2000, and April 16,2001.

J. Conclusion

Claimant is not a Jones Act seaman because his connection to the DISCOVERY was only transitory and his employment did not expose him to the perils of the sea. Claimant's workplace accident aggravated his underlying PTSD symptoms as documented by Claimant's Veterans Administration records, his testimony, and the fact that Claimant held numerous jobs prior to his injury, but did not work at all following his injury. Dr. Zipnick's recommended surgery is both reasonable and necessary because Claimant, in consultation with Dr. Zipnick, consented to the procedure, and the procedure had a sixty percent chance of improving Claimant's pain symptoms that were related to his workplace injury. Because Claimant's workplace accident caused his current

physical condition, Claimant is entitled to Section 7 benefits, including reasonable mileage expenses for attending appointments with his pain management specialist Dr. Laitin. The nature and extent of Claimant's physical injury, which aggravated his underlying PTSD render Claimant totally disabled. Claimant has not reached maximum medical improvement because he is contemplating undergoing surgery with a view toward improvement. Considering the effects of Claimant's pre-existing PTSD and his demonstrated inability to keep a job for any substantial length of time, Claimant's earning capacity at the time of his injury is best measured by averaging his annual earning in the two year period prior to his accident. This results in an average weekly wage of $256.85, and a minimum compensation rate of $200.27 at the time of his injury. Because Employer terminated Claimant's benefits on June 21, 2000, and did not file a notice of controversion until April 16, 2001, Employer is liable under Section 14(e) for a ten percent penalty on all compensation payable during that time period.

K. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et. al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

L. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to 33 U.S.C. § 908(b) of the Act from December 16, 1996 and continuing, based on an average weekly wage of $256.85, and a corresponding minimum compensation rate of $200.27.

2. Employer shall pay a ten percent penalty pursuant to 33 U.S.C. § 14(e) of the Act on all benefits payable between June 21, 2000 and April 16, 2001.

3. Employer shall provide to Claimant all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, including, but not limited to Dr. Zipnick's recommended lumbar laminectomy at L5 and potentially L4, decompression of the L4-5 and S1 nerve roots, and mileage expenses at the rate of .365¢ per mile.

4. Employer shall be entitled to a credit for all wages paid to Claimant after December 15, 1996.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge